In the Supreme Court of the United States.

OCTOBER TERM, 1914. No. 183.

Louisville and Nashville Railroad Company, Plaintiff in Error,

vs.

Western Union Telegraph Company, Defendant in Error.

REPLY BRIEF ON BEHALF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR.

In view of the elaborate argument already filed, this brief will be substantially confined to a reply to that filed by the Western Union Telegraph Company, and will follow the plan of presentation adopted in the latter.

I. WESTERN UNION HAD NO AUTHORITY TO OWN AND OPERATE A LINE OF TELEGRAPH IN THE STATE OF LOUISIANA.

Under this head we will consider:—

(*a.*) By the law of the State of its creation—New York—Western Union was not authorized;

(*b.*) Nor by the Act of Congress of 1866, nor by any other Act of Congress, was it so authorized.

(*c.*) A prerequisite condition to the exercise, under the law of the State of Louisiana, of the power to expropriate, was ignored in the lower Court.

(*d.*) Neither by the law of Louisiana, nor by any Act of Congress, was authority given to one telegraph company, to expropriate property needed for the purposes of another telegpraph company.

(a.) *By the law of the State of its creation—New York—Western Union was not authorized.*

Western Union practically concedes, what it must concede, *i. e.*, that authority must have been granted to it by the State creating it, to enable it to construct and operate its telegraph. It does not contend that the mere grant of the right to exercise eminent domain, conferred by another State, will be sufficient, if the exercise to it of such power, be not conferred by the State of incorporation.

This concession is made, inferentially, by our adversaries, when they contend that "it is not true that under its charter "and the law of the State of New York, under which it is "incorporated, the Western Union Telegraph Company was, "at the time this suit was instituted, prohibited in express "terms or by implication from operating in Louisiana."

Water Works *vs.* Farmers' L. & T. Co., 20 Colo., 209;

Canada Southern Ry. Co. *vs.* Gebhart, 109 U. S., 529;

Bank of Augusta *vs.* Earle, 13 Peters, 585; and

Thompson on Corporations, 2nd Ed., Vol. 5, Sec. 6627.

See also Central Trans. Co. *vs.* Pullman Palace Car Co., 139, U. S., 24;

Pittsburgh, etc., R. Co. *vs.* Keokuk, etc., Bridge Co., 131 U. S., 371;

St. Louis, etc., R. Co. *vs.* Terre Haute, etc., R. Co., 145 U. S., 393;

Jacksonville, etc., R. & Nav. Co. *vs.* Hooper, 160 U. S., 514;

California Bank *vs.* Kennedy, 167 U. S., 362;
Concord First Nat. Bank *vs.* Hawkins, 174 U. S., 364;
Louisville, etc., R. Co. *vs.* Louisville Trust Co., 174 U. S., 552;
Rolfe *vs.* Rundle, 103 U. S., *222*; and
Railroad *vs.* Koontz, 104 U. S., 5.

As a corporation can incur no liability, in a matter in which it is not authorized to act, by the State of its incorporation, it could not be compelled to make compensation for property appropriated by it *ultra vires*.

It is conceded by our adversaries that the Western Union had no power, under its original incorporation, to operate in the State of Louisiana. It claims to exercise it, however, by virtue of Section 1 of the Act of April 22d, 1862, and says:—

> "4. It was authorized to construct, own, use and "maintain any line or lines of electric telegraph not "described in their original certificate of organization, "whether wholly within or wholly or partly beyond the "limits of the State of New York, and this section re-"quired no action whatever upon the part of the com-"pany as a condition precedent to the exercise of the "said right. The words in said section 'upon the terms "'and conditions, and subject to the liabilities pre-"'scribed in the said Act' manifestly import simply "that as to such additional lines as said company might "construct under the permission granted by the said "section, the company should be bound by the various "provisions of the original Act of 1848, regulating "the duties and liabilities of the companies organized "thereunder."

The Western Union was incorporated under the Act of 1848, which was amended by the Act of April 8th, 1851; by that of April 12th, 1853; and by that of April 12th, 1862.

None of these Acts, saving that of 1848, were original enactments. They were amendatory of the Act of 1848. That Act, as originally enacted, must be read as it now stands amended.

No provision of the Act of 1848, or of subsequent amendments, was repealed by any later amendments. The only effect of these was, to alter, so far as the amendment made alterations, what had been originally directed.

The Act of 1862, therefore, upon which the appellee relies, must be read into the Act of 1848, as a part thereof as it stood amended. All provisions not modified prior to the last amendment, remain in full force.

As is stated in Black on Interpretation of Law, Sec. 131:

> "An amendment of a statute by a subsequent Act "operates precisely as if the subject matter of the "amendment had been incorporated in the prior Act at "the time of its adoption, so far as regards any action "had after the amendment is made."

As is said in Lewis' Sutherland Statutory Construction, 2nd Ed., page 444:—

> "It is a general rule, however, that an amended "statute is constructed as regards any action had after "the amendment was made, as if the statute had been "originally enacted in the amended form. The effect "of an amendment of a section of the law is not to "sever it from its relation to other sections of the "law, but it is to give it operation in its new form, as "if it had been so drawn originally, treating the whole "Act as a harmonious entirety, with its several sec- "tions and parts mutually acting upon each other."

Again, as is said in Black on Interpretation of Law, Sec. 130:—

> "When an amendment to a statute is adopted there "are not two separate enactments, the old and the new, "but by their union there is produced one law, viz.; "the statute as amended. From this it follows that "the legislative intention in making the amendment "is to be learned from a consideration of the original "Act, and the amendment as one Act. And conse- "quently, on the principle that the interpretation is to

"be such, if possible, as to give effect to every clause "and provision of every statute no portion of either "the original Act or the amendment should be de- "clared inoperative if it can be sustained by any "rational construction, and without putting upon the "language employed a forced or unnatural meaning. "For the same reason, of two constructions, either of "which is waranted by the words of an amendatory "Act, that is to be preferred which best harmonizes "the amendment with the general tenor and spirit of "the Act amended."

The Act of April 8th, 1851, (Appellee's Brief, page 33), gives to the directors and trustees of a telegraph company, incorporated under the Act of April 12th, 1848, "at any "time, with a written consent of the persons owning two- "thirds of the capital stock of such company," power to "extend their line of telegraph, or to construct branch lines "to connect with their main lines, &c."

This, being an amendment to the Act of 1848, is, therefore, a part and parcel thereof.

Any powers given to the directors or trustees of a telegraph company by any subsequent statute, must be accepted with the restriction that the consent of the stockholders to such extension shall be given.

There is no suggestion in the Act of April 22d, 1862, that this consent is not required. The subject is not dealt with. The power is conferred upon the telegraph company to extend its lines, &c., but this power is subjected to "the "terms and conditions and liabilities in the matter of con- "structing, leasing, owning, using or maintaining said lines, "prescribed in the Act of 1848, so far as such provisions are "applicable to the construction, using, maintaining, &c., of "such lines."

Our adversaries suggest, without attempting to demonstrate, that the subjection did not include, as a condition precedent to the right of the corporation to construct the additional lines, a compliance with the affirmative conditions precedent prescribed in the Act of 1848 as amended.

Their suggestion is, that Section 2 of the Act of 1862 provides for filing a certificate describing the general route of such extended line or lines, and that, therefore, the provision requiring consent of two-thirds of the stockholders, is unnecessary.

The filing of the certificate, however, is only one of the things required to be done by the telegraph company. Nothing is said, in the second section, by way of release of the obligation to obtain the consent of the stockholders to the action of directors.

It is difficult to understand, why, or how, the condition of the Act of 1848 as amended; requiring such consent, is not one of the terms, conditions and liabilities prescribed by the Act in the matter of constructing, using, maintaining, owning or holding extended lines.

There is no suggestion, in any part of the record, that the consent of the stockholders, as required by the amended Act of 1848, was ever given, and, without such consent, the corporation could not exercise the power.

Not only was the legislative power coupled with the necessity of obtaining this consent, but the corporation itself, in its Articles of Incorporation (Record, 167), provided:—

> "Art. 24. Whenever the board of directors, by a "vote of the majority of all the members thereof, shall "determine that it is for the interests of the company to "extend its business by adding to the number of wires "or conductors upon the lines aforesaid, or by con- "structing any other line or lines to operate in connec- "tion therewith, &c., they shall enter their determina- "tion upon their minutes at large; and all such addi- "tions shall be made by an increase of the capital stock, "and in no other manner."

(Here follow directions as to the manner of calling a stockholders' meeting to approve or disapprove.)

The Article concludes:—

> "If at such meeting the persons owning two-thirds "of the stock shall vote in favor of such increase, &c.,

"the directors shall be authorized to increase the stock "accordingly."

(b.) *Nor by the Act of Congress of 1866, nor by any other Act of Congress, was the Western Union authorized to construct or operate in Louisiana.*

The Act of Congress conferred no franchise upon the Telegraph Company to enter upon railroads, either with, or without, the consent of the companies owning the same. Its provisions assumed the existence of power in the Telegraph Company to do what it permitted, *i. e.*, to enter upon post roads, and upon railroads where the owners assented to such entry.

Not only did the Act of 1866 confer no power to occupy any portion of the Railroad property under the right of eminent domain; but it professed to confer no power upon a corporation which it was not authorized to exercise under powers granted by the State to which it owed its corporate existence.

In the Pensacola case, 96 U. S., 11, speaking of the Act of 1866, it is said:—

> "It gives no foreign corporation the right to enter "upon private property without the consent of the "owner and erecting the necessary structures for its "business; but it does provide that whenever the con- "sent of the owner is obtained, no State legislation "shall prevent the occupation of post roads for tele- "graph purposes by such corporations as are willing "to avail themselves of its privileges."

This Court, in Western Union Telegraph Company *vs.* Attorney General, 125 U. S., 530, said:—

> "The telegraph company, which is the defendant "here, derived its franchise to be a corporation and "to exercise the function of the telegraphing from the "State of New York. It owes its existence, its capac- "ity to contract, its right to sue and to be sued and to "exercise the business of telegraphy to the laws of "the State under which it is organized. But the privi-

"lege of running its lines or wires 'through and
" 'over any portion of the public domain of the United
" 'States,' &c., is granted to it by the Act of Congress.
"This, however, is merely a permissive statute."

In Western Union Telegraph Company *vs.* Gottlieb, 190 U. S., 421, it was held that a taxation upon franchises owned by the telegraph company "did not and could not "have included therein any franchises derived by the de-"fendant from the Government of the United States, be-"cause the government had conferred no such franchise."

(c.) *A prerequisite condition to the exercise, under the law of the State of Louisiana, of the power to expropriate was ignored in the lower Court.*

The Louisiana Expropriation statute (Plaintiff in Error's Brief, page 153), confers the right only under the express proviso:—

"That the ordinary use of such roads, works, rail-"roads and waters be not thereby obstructed."

The question of obstruction was at issue, under the pleadings.

It was expressly averred in the answer of the Louisville & Nashville (Record, page 53):—

"Defendant avers that the construction of the line "of poles and wires as proposed will seriously interfere "with and hamper the ordinary use of property in each "of the several above respects, as shown by experience. "* * * The interference would be serious, and, in-"deed, in time, destructive, and the interference with "defendant's telegraph business, and espcially with the "business along the route it has selected, would be "destructive from the beginning; all contrary to acts "of Congress of June 15th, 1866, July 24th, 1866, and "Article I, Section 8, paragraphs 3 and 7, of the Con-"stitution of the United States, and the Louisana Act "140 of 1880."

A considerable amount of testimony was offered by the plaintiff in error, which was not seriously controverted by the defendant in error, to the effect that the taking of its right-of-way as proposed, would seriously hamper and interfere with its construction of a line of telegraph and telephone poles and wires necessary for the operation of the railroad; that delays would necessarily result in consequence of needed reparation, from time to time, of its lines; that it would be subjected to danger from fires; that its use of its bridges over navigable streams would be injuriously affected; that the bridges themselves would be exposed to undue danger; and that its right-of-way would be required for its future operations.

It is true that the defendant in error argues that the railroad company has no right to be considered, in the matter of its future necessities; and that all to which attention can be demanded, is present needs.

We submit that this view is entirely inadequate. Every railroad company acquires a right-of-way, larger in width than what may be immediately required, because its inevitable growth and increasing public demands will necessitate the laying down of additional tracks, and the occupation, more and more, of a greater width of way.

To permit a telegraph company, permanently, to take a portion of a right of way not in immediate use, although likely to come into such use, would be to defeat the very purpose of the taking.

Presumably, no greater amount of right-of-way is taken than is needed, because the taking entails expense. If future needs are not to be considered, the railroad company would be forced, even if it be practical to do so, to acquire additional width of way.

The right to take being upon the condition that there should be no obstruction, and the issue of fact as to the obstruction, having been raised, supported on the part of the plaintiff in error by testimony, the taking could only be complete, and, of course, damages could only be awarded, if no obstruction was entailed.

The learned Judge charged the jury that they must not take into consideration, the question of whether or not the railroad would be obstructed in its operation; but that the sole question to be considered was, the amount of damages to be awarded.

If, therefore, the present judgment be affirmed, we have a final judgment in favor of a taking, which was only conditionally granted, without any determination as to whether the condition did or did not exist.

(d.) *Neither by the law of Louisiana, nor by any Act of Congress, was authority given to one telegraph company to expropriate property needed for the purposes of another telegraph company.*

The testimony showed how great an interference with the railroad's use would, necessarily, be entailed, by the occupancy of the Telegraph Company. (Record, page 79.) The poles must be guyed about two-thirds of the distance of the height of the pole above the ground—say sixteen feet on each side of the pole. The guys are sometimes braced by another pole, and sometimes by anchors with a storm string.

The arms (Record, page 87) on which the wires are placed project a distance of from six to ten feet.

It appeared by the testimony that the Railroad Company had appropriated the site desired to be taken by the Telegraph Company for its own use for telegraphic and telephonic purposes, in operating its line, and also for the general commercial use which it was authorized to make.

At the time of the trial, therefore, the right which was sought to be expropriated was exercised upon a site not only in use for a railroad right-of-way, but upon a right-of-way which had been appropriated for telegraphic purposes.

The Expropriation Statute of Louisiana confers no right upon one telegraph company to enter upon property appropriated for other telegraphic uses.

II. THE RAILROAD COMPANY WAS ENTITLED TO A PREFERENTIAL RIGHT TO THE SITE FOR TELEGRAPH PURPOSES, AND THE TELEGRAPH COMPANY HAD NO PREFERENTIAL RIGHT THERETO.

The first agreement entered into between the litigants bore date the 31st of May, 1876. Since that time, under contract, the Telegraph Company has occupied, with its poles and wires, a portion of the right of way.

The last agreement was entered into on the 18th of June 1884, for a term of twenty-five years from the first day of July, 1884, and, thereafter, until the expiration of one year after written notice should have been given by one of the parties to the other, of a desire, or intention, to terminate the same.

Under this agreement, the Railroad Company was to furnish free transportation to the employees of the Telegraph Company in and about the care and management of the poles and wires on its right of way, and was to transport materials, etc., free of charge.

The Telegraph Company was to construct a line of telegraph, with instruments, etc., with use of batteries for successful operation of the wires, and was to furnish telegraph facilities by wires strung upon the poles and otherwise, to the Railroad Company in and about its business, in the manner therein provided.

The site of the poles and wires which were thus to accomplish the telegraphic business of the Railroad Company as well as of the Telegraph Company, was selected, at a point which would be convenient for both, and lines and wires in use for railroad purposes were strung along the poles thus erected.

The necessary business of telegraphing and telephoning, incidental to the operation of the Railroad Company, was thus accomplished by the use of the poles and wires, which, otherwise, it would have been obliged to construct.

The termination of this agreement was not at the instance of the Railroad Company, but at that of the Telegraph

Company, which (Record, page 67), on the 11th of August, 1911, notified the Railroad Company that upon the expiration of one year from the date of delivery of said notice it would terminate its [illegible] agreement.

What took place in the present case was not the result of any necessity imposed upon the Telegraph Company, but because of its own desire to better itself by appropriating permanently, to the exclusion of the Railroad Company, at a little cost, what it had acquired as a licensee, by contract.

The difference to the Railroad Company in having as its right of way a corporation permanently given possession thereof, authorized to conduct thereon its business without any control by, or benefit to it, or in being left in control of its right of way without interference with its power to do, from time to time, what, in its judgment, would be necessary for its successful operation, was very great.

What was sought by the Telegraph Company, and conferred by the Circuit Court, was a monopoly, forever, of the right to operate a telegraph or telephone on the railroad right of way, because there would be no ability thereafter to accord a rival corporation needful space.

The Telegraph Company declined to resolve by offering, in that spirit of liberality heretofore shown by it in many of the many cases in which it has made its not meagre contribution to the exactions upon the time of this Court, so full compensation for its permanent occupation, *five dollars per mile*, or about one hundred and seventy-five dollars in all.

It sought to expropriate to itself, that part of the right of way which was best adapted for use for telegraph purposes, inasmuch as the right of way having been originally located upon a marsh, to utilize the other side thereof, would require a large expenditure.

It does not appear that there was ever any resolution by the board of directors, or by the stockholders, of the Telegraph Company, appropriating the site. The communication as to its intentions came only from one, two or more of its officers.

[redacted]

"graph of messages necessary in the conduct of its busi-
"ness of running trains and transporting persons and
"freight, and is now using the same for the said pur-
"pose."

Also (Record, pages 55-56):—

"That under the said contract and the provisions
"thereof the petitioner and the defendant selected the
"point at which the poles should be placed for the put-
"ting thereon of cross-arms and the stringing of wires,
"for the joint use of the petitioner and the defendant;
"and that in such selection the defendant chose the best,
"most convenient, least expensive and most proper place
"for the erection, maintenance and operation of a tele-
"graph line for its own business, and if the petitioner
"be allowed to condemn the said location and appro-
"priate the same for its own exclusive use, then the
"defendant will be deprived, not only of a portion of
"its right of way, but also of that portion which is
"best, most convenient, most practicable and least ex-
"pensive in the construction, maintenance and opera-
"tion of its own line of telegraph; and defendant is
"advised and believes that such condemnation cannot
"be had under or by virtue of the acts of Congress or
"by statute of the State of Louisiana; that the petitioner
"in its petition has located the lands as to be condemned
"for its purposes the land now occupied by the poles,
"cross-arms and other instrumentalities of the peti-
"tioner; and the said location is one which has been
"appropriated by the defendant for its telegraph lines,
"and that the condemnation by the petitioner would
"interfere with the ordinary travel and use of the rail-
"road of the defendant, and no condemnation can be
"had of any part of the said right of way under the
"said petition, since no other location but that now
"occupied by the said line of telegraph is described or
"sought in the said petition."

These averments of the answer pertain to the location originally selected by both parties to the contract of June 18th, 1884 for the telegraph line maintained and operated

thereunder for their joint use until its termination. (See Contract, Record, pages 31-46.)

It is, however, still further alleged in the answer, with respect to the location selected by the Railroad Company for its telegraph and telephone line, after the delivery on August 17th, 1911, of the Telegraph Company's notice to terminate the then existing contract and after the amendment of the charter of the Railroad Company in November, 1911, as follows (Record, pages 56-57):—

> "And defendant avers that not only has it the present "right to string its wires upon the poles erected by the "petitioner under the contract aforesaid, and to use the "said wires in its railroad business, but it also avers that "it has procured an amendment to its charter of which "copy is herewith filed as part hereof by which it is "authorized to contract, maintain and operate a tele-"graph line for the use of the public, and thus to be a "common carrier of telegraphic messages, and has filed "with the Postmaster General of the United States its "acceptance of all the 'restrictions and obligations of "'the Act of Congress, approved July 24th, 1866, en-"'titled an Act to aid in the construction of telegraph "'lines and to secure to the Government the use of "'the same for postal, military, and other purposes,' "all of which is shown by copies filed herewith as part "hereof; and that in pursuance of the said amendment "defendant has caused to be located the lines for the "purpose of telegraphic transmission of messages, both "relating to its own business and those sent for the "public for hire, at the identical place and line now "occupied by the poles erected by the petitioner and "heretofore and now used jointly by the petitioner and "the defendant; and defendant alleges that the said line "of location has been made not only in what it is advised "is a due exercise of its legal right, but in the exercise "of due prudence, care and proper economic considera-"tion, it being, as aforesaid, the best place upon the "said right of way for the construction, maintenance "and operation of a telegraph line; and defendant is "advised and believes, and therefore avers, that there is "no authority under the statutes of the United States,

"or the statute of the State of Louisiana, for one "public telegraph company, being a common carrier of "telegraphic tolls, for the public, to condemn the prop- "erty or the line, or any of the instrumentalities of "another telegraph carrier, common carrier of tele- "graphic messages, and, therefore, that the petitioner "has no right to condemn the said location sought for "in the said petition.

"Defendant avers that it is advised and believes "that the petition of the petitioner seeks to condemn a "right of way for its poles at each and every point "where its poles are now located along the right of "way of the defendant; and the defendant avers that if "the said condemnation should be had, and the peti- "tioner placed in exclusive appropriation of said space, "it the defendant, in the carrying on of its business as "a railroad for the transportation of telegraphic mes- "sages will be compelled to construct, maintain and "operate an independent telegraph line between its "stations, for the purpose of conveying telegraphic "messages necessary in the operation of its trains and "otherwise, and it avers, that at various places along "the line of its railroad, by virtue of natural and arti- "ficial conditions, it would be impossible for defend- "ant to construct its own line on its own right of way, "and the result, therefore, of the condemnation as "sought for by the petition would be that the peti- "tioner would be allowed to monopolize the right of "way of the defendant, and the defendant would be re- "quired to construct in considerable part of its own line "off its own right of way; and defendant is advised "and believes that such a result must necessarily ob- "tain, and that such a result is not legal under the stat- "utes invoked by the petitioner."

The Telegraph Company (Brief, page 18), in discussing the claim of the Railroad Company to a preferential right to a location on its right of way, after referring to certain exceptions to its petition and to the Court's order overruling the same, on August 1st, 1912, says: —

"Thereupon the defendant, filed its answer, in which, "among other numerous defenses, there was set up,

"for the first time, the defense now insisted upon here, "that the defendant desired to use and was entitled by "preference to use for telegraph purposes the particu- "lar route along its right of way which was sought to "be expropriated by the plaintiff, and in support of "this defense there was adduced evidence to the effect "that after the institution of the present suit, one of "the defendant's engineers, acting under instructions "received from some undisclosed officer or representa- "tive of the defendant company, had proceeded to "locate for the defendant the route of a proposed tele- "graph line on its right of way between New Orleans "and Pearl River, and had located for this purpose the "exact route which had been occupied for years by the "defendant (in error), and which the defendant (in "error), was seeking to expropriate in this suit."

It gives no information as to when, or how, the Railroad Company should, or could, have set up this claim, before filing its answer. Certainly that was the appropriate time, and then was afforded the first opportunity.

It is stated that the Railroad Company's selection of this location, for its own telegraph and telephone lines, was made *after* the institution of this suit. If the question of priority in this respect was important or controlling, which we deny, the Telegraph Company's operation would not be found to be barred, by aught in the Record. That suit was not "instituted" until the Judge of the Court had made a valid and proper order upon the petition filed, and the clerk in pursuance thereof had issued a valid notice or process according to law, to the Railroad Company to answer the petition of the Telegraph Company, stating the object thereof. The record shows this was not done. On the contrary, the notice first issued by the clerk, April 12th, 1912, called upon the Railroad Company toanswer a petition of the "City "of New Orleans," and was therefore, fatally defective, and was, upon a special appearance entered solely for that purpose, excepted to by the Railroad Company, May 20th, 1912. (Record, pages 8-9.) This exception the Court, on the same day, sustained. It quashed the

notice theretofore issued. (Record, page 9.) No valid notice was issued until May 21st, 1912, and it was not served by the sheriff on the Railroad Company until May 31st, 1912. (Record, pages 10-13.)

It may well to examine what the record establishes with respect to the time the Railroad Company located or selected its route for its telegraph line.

Turning to the uncontradicted testimony of the witnesses, with respect to the date of locating the route selected by the Railroad Company, for its own line of poles and wires, we find that W. H. Courtenay (who is referred to in the brief of the Telegraph Company's counsel as "one of the de-"fendant's engineers, but who, in fact, was, as the Record shows, the Railroad Company's chief engineer), testifies on this point as follows (Record, page 116):—

> "*The Louisville and Nashville Railroad ordered its "employees, and the order came to me as head of the "maintenance of the road department*, and also to a "representative of the transportation department, and "chief operator, to locate for the Louisville and Nash-"ville a line of poles for a telegraph and telephone line "for its own purposes. Such a location was made. I "instructed Mr. W. G. Brown, roadmaster of the New "Orleans Division, to co-operate with Mr. R. R. "Hobbs, chief operator of the Railroad Company, to "locate a line of poles and lines, for the Louisville and "Nashville Railroad Company's use. That was done "by them."

Being asked what line was located in the New Orleans Division, he answered (Record, page 116):—

> "They located a line substantially as that now oc-"cupied by the Western Union Telegraph Company."

Being further asked if he knew the reasons for that choice, he gave in full (Record, pages 117-118), the reasons we have quoted in our original brief (pages 130-131). He further stated the pole line, when constructed by the Railroad Company on the present location, could be

used for both telegraph and telephone wires *and that he knew from the order of the board of directors and the authority thereby given,* it was the purpose of the Railroad Company to so use its pole line. (Record, page 118.)

Being asked if he had also received any oral instructions with respect to the location for the Railroad Company's telegraph line, he stated (Record, page 119):—

> "I did, from the *Fourth Vice President* * * *, "to have a Louisville and Nashville line of poles and "wires located actually on the right of way by sending "men over it to select the best location, and to locate "it, and to indicate on our right of way maps where "the best location is * * * for the poles and wires."

The Telegraph Company is in error when it asserts, in its brief, that the location made was "under instructions received from some *undisclosed* officer or representative "of the defendant company."

Courtenay also said (Record, page 119):—

> "We were merely given instructions to get the best "location for poles and wires for telephone and tele- "graph purposes. * * * These two representa- "tives of the company whom we had to locate the poles "and wires, went over the line on special trains for "the express purpose, and they did locate them and "reported on their location."

On being asked by the Telegraph Company's counsel when he had received these instructions from the executive officers of the Railroad Company to locate this line, he answered that it was a "good many months ago," but as he thought, within less than a year. (Record, page 120.) He further testified that he did not know the date the location was made in Louisana, but added (Record, page 120):—

> "We made these locations pretty generally over the "whole system and the orders were given at different "times. I think it has been nearly a year ago since

"the orders were given. They were not all given the "same time. The orders for one line were given at "one time and one line at another. I don't recall when "the order was given to locate here. Mr. Brown is "here and he can testify to that. He received the "order."

W. G. Brown, roadmaster of the New Orleans and Mobile Division (who with Chief Operator Hobbs made the location of the Railroad Company's telegraph line in Louisiana), when examined as to the date of such location, testified it had been within the preceding six months; that he had some maps, but did not know whether the dates were on them or not; that he had located the line or selected the route for a telegraph line, going over it with Chief Wire Inspector Hobbs, making plans therefor on the right of way maps; that the route selected was practically the same as that then occupied by the Telegraph Company, because it was the best and firmest ground, and away from the canal which exists on the north side of the track. (Record, pages 120-121.)

Charles Marshall, superintendent of said division since September 1st, 1886, when asked by the Railroad Company's counsel as to the date Brown and Hobbs had located on the ground the Railroad Company's telegraph line in Louisiana, testified (Record, page 133):—

"The chief engineer wrote to me on April 18th, "and I received the letter on April 20th, and I gave in- "structions on the same day in was received to the road- "master to locate a line in Louisiana in conjunction "with the chief operator of the line, which he did, and "indicated the location on the blueprints which I have "turned over to your office."

The Telegraph Company, in its Brief (page 18), says there was evidence that the selection of this particular line was considered the best route because the ground on that portion of the Railroad Company's right of way "was some- "what firmer than on the other side of the railroad track,"

leaving this Court to infer that was the only reason for its selection. That, however, was not the only factor which entered into such selection, as Chief Engineer Courtenay testifies. (Record, pages 117-118; Our Original Brief, pages 130-131.) The extraordinary expense and the interference with and obstruction of railroad operations, not to speak of the impracticability, of the construction, operation and maintenance of a telegraph line by the Railroad Company elsewhere or at any other location on its right of way, are abundantly established by the testimony embodied in the record and referred to in our original Brief. The economy and better operating conditions which would result from the preservation by the Railroad Company of its present location for its line of poles and telegraph, telephone and signal wires were likewise clearly shown at the trial, as the record shows. The Railroad Company, for many years prior to the trial, had owned, operated and maintained two circuits, consisting of four (4) telephone wires and also three (3) telegraph wires, attached to the Telegraph Company's poles at the location selected by the Railroad Company on its right of way for its own line of poles and wires. This is admitted by the Telegraph Company's own witnesses. (Record, page 87, at bottom; page 94, at top.) The same witnesses further admit that a line on the present location is cheaper to construct and maintain, and that there are places along the railroad right of way where another telegraph line could not be constructed without great expense. (Record, page 95.)

On the other hand, Chief Engineer Courtenay, being asked about the expense to the Railroad Company in putting up its own poles at the location it had selected and where its wires were then, and for years had been strung, said (Record, page 118):—

> "To construct poles close to and on the present line, "and to transfer the wires of the Louisville and Nash- "ville to the new pole line (could be done) at a trifling "expense."

It is certain, therefore, that the preferential right claimed and exercised by the Railroad Company in selecting the location on its right of way for the construction, operation and maintenance of its own line of poles and wires was, and is, based not merely on considerations of "conveni- "ence," as counsel for the Telegraph Company have urged in their Brief.

It is urged that "no evidence of any *corporate* action by "the defendant corporation, in this connection, was adduced." (Page 18.) No written evidence of corporate action was necessary, or required, to establish the fact that the Railroad Company had made selection of this particular part of *its own* right of way for a necessary adjunct in the conduct of its railroad business. It was quite sufficient to show, by the sworn testimony of its officials, that the Railroad Company did, in fact, take action in the premises, and that its fourth vice-president had given instructions to its chief engineer, long before this suit was instituted, to cause the best location to be made on its right of way for such line of poles and wires, not only in Louisiana, but on its entire system, in all the States wherein its railroads were operated, and that this had actually been done by subordinate officials in pursuance of those instructions.

No evidence was adduced by the Telegraph Company that any corporate action was taken, on its part, to select the location contended for. No such corporate action is alleged in the petition to have been taken. No evidence thereof, either oral or written, was introduced at the trial.

If evidence of corporate action in selecting a location for its telegraph line b ythe Railroad Company, on its own right of way, was essential to its validity, or to show a preferential right thereto, *a fortiori*, it was essential to allege and to produce, competent evidence of such corporate action on the part of the Telegraph Company, in its suit to expropriate.

The Telegraph Company errs in alleging that the Railroad Company really does not intend to build a telegraph or telephone line on its right of way, where it has located the same. The contrary clearly appears. A railroad cannot be operated

without a telegraph or telephone line, by which to direct and control the movement of passenger and freight trains. When the Telegraph Company gave its notice to the Railroad Company, August 17th, 1911, terminating the contract between the two companies at the end of one year thereafter, it was manifest to the Railroad Company that the necessity for the construction of its own telegraph and telephone line on its right of way had become absolute. It became necessary, either to construct, or to cease to transact the business of a common carrier by railroad. With that necessity staring its officials in the face, it was deemed wise and economical management, to secure an amendment to the charter of the Railroad Company to enable it, not only to construct, operate and maintain a telegraph and telephone line of its own for carrying in its railroad business, but also for commercial purposes. Steps to that end were taken, beginning as early as November 2d, 1911, when its board of directors, consisting of thirteen members, signed the amended articles of incorporation of that date, and acknowledged the same before notaries public of various States, on different dates, prior to November 23d, 1911, the day when said articles were lodged and recorded in the office of the Clerk of the County Court of Jefferson County, Kentucky, as required by law. (Record, pages 210-216.) These articles were also filed in the office of the Secretary of State of Kentucky, December 1st, 1911, and in the office of the Kentucky Railroad Commission December 4th, 1911, in accordance with Section 764, Kentucky Statutes. (Record, pages 216-218.) At the meeting of the board of directors, December 21st, 1911, a resolution was adopted, whereby the president was authorized and directed to execute the written acceptance by the Railroad Company of the restrictions and obligations of the Act of Congress of July 24th, 1866, and to file the same with the Postmaster General of the United States, as required by that Act. (Record, pages 208-210.) Such acceptance was duly executed by the president, on behalf of the Railroad Company, January 12th, 1912, and was filed with the Postmaster General January 15th, 1912. (Record, pages 219-220.) Thereupon the Executive Depart-

ment issued orders to the Chief Engineer to proceed to locate the best route on the Railroad Company's right of way, from both an economical and operating standpoint, for its telegraph and telephone line. These order were given at different times, not all at the same time, and the locations for such line were made "pretty generally over the whole sys-"tem." (Courtenay, Record, page 120.)

There were many good and sufficient reasons, such as economy in cost of construction, of maintenance, and of operation, and the nature of the existing physical conditions, which led to the selection of the locality whereon the poles and wires of the Telegraph Company, as well as the wires of the Railroad Company, had been for twenty-five years, operated. That location was the best to be found on the Railroad Company's right of way. Indeed, in many places, and for long distances, there was no other available for that purpose as the uncontradicted proof established.

It is a matter of wonder, therefore, that, acting under instructions of their superiors in office to select the best location, Roadmaster Brown and Chief Operator Hobbs selected and located the Railroad Company's line where they did, in April, 1912, and made out and traced their plans therefor on the right of way maps, and so reported the same to the Chief Engineer? They could not have done otherwise. They would have been disloyal to their employer and its interests had they selected or adopted any other location, even if any other had been practicable. The presence of the Telegraph Company's poles and wires did not affect, from a legal standpoint, the Railroad Company's right of choice. The right of way was its own property, of which it had the right of exclusive possession and use, at the expiration of the contract, an expiration brought about by the Telegraph Company, by its own deliberate, voluntary, act.

When the foregoing undisputed facts, disclosed by the record, are duly considered, it seems impossible to avoid their significance or the conclusion to be drawn from them,

as the Telegraph Company attempts to do, when it says in its Brief (page 21):—

> "It does not appear that the Louisville and Nash-
> "ville Railroad Company intends and proposes in good
> "faith to construct a line of its own on the location of
> "the line presently occupied by the Western Union
> "Telegraph Company."

Again, shutting its eyes to what the record actually contains, and, in lieu of argument on the facts proven, it is pleased to make this ungenerous, and unwarranted, assertion, in its Brief (page 22):

> "It is quite clear that this question has been injected
> "into this case simply by way of *subterfuge*, and as
> "a means of preventing or delaying the plaintiff com-
> "pany in obtaining the right of way to which, under
> "the law, it is *entitled*."

We submit that there is absolutely nothing in the record to justify this impugning the motives of the Railroad Company in the its defense of its property rights. It is manifest, from an examination of the record, that the Railroad Company, but for this condemnation proceeding, would, long since, have erected and put in operation its own telegraph and telephone line upon the location it selected therefor. Its purpose to do so in good faith is demonstrated by the testimony beyond controversy. In no other way can the Railroad Company faithfully serve the interests of its stockholders and free itself from a compulsory dependence upon the Telegraph Company, in the discharge of its public duties. It requires very little argument to demonstrate, in this case, that the Railroad Company will, at the earliest practicable date after the reversal of the judgment herein complained of, proceed to construct, maintain and operate, its own line of poles and wires, upon the location it has selected, on its own right of way.

No question of good faith was raised in the trial Court. There, the right claimed by he Telegraph Company was, to exclude the Railroad Company from the route it had

selected, on the theory that its suit was instituted before the Railroad Company had manifested its choice of such route. The Telegraph Company, by its previous occupancy of the route in question, under the contract of June 18th, 1884, had acquired no preferential right, on legal or equitable grounds, to continue such occupancy upon the expiration of that contract, to the exclusion of the owner, who was then, because of the tenant's action, compelled to select the same route for its own indispensable public uses and purposes. This was decided in Western Union Telegraph Co. vs. Pennsylvania R. Co., 120 Fed., 362, 369, affirmed by the Circuit Court of Appeals for the Third Circuit in 123 Fed., 33, and by this Court in 195 U. S., 594, cited in our original Brief (pages 80-81). In other words, the Telegraph Company in this case as in other like cases, stands on no different, or better, footing, than if it were a stranger company which had never had a contractural right to occupy the Railroad Company's right of way for telegraph uses and purposes. As was well stated by the Supreme Court of Georgia (138 Ga., 420, 427; 75 S. E. 471, 475, 477, cited in our original brief, pages 78-89):

> "In view of the Telegraph Company's voluntary ter-
> "mination of its contract with the Railroad Company,
> "the latter is compelled to erect and maintain its own
> "telegraph posts and wires, in order to operate its own
> "by means of electrical signals and orders. The Rail-
> "road Company contends that it should have the right
> "of prior selection in the location of a line of telegraph
> "for railroad use, and that it intends to erect poles
> "upon substantially the same location as at present
> "occupied by the Telegraph Company. * * * As-
> "suming, of course, the necessity of a line of telegraph
> "as auxiliary to the operation of a railroad company,
> "the Railroad Company would have the same right in
> "locating its telegraph lines as it would have in locating
> "its railroad track, or its depot, and its warehouses on
> "its own right of way. * * * It would indeed be
> "a most unfair demand to make of the owner of prop-
> "erty, charged with the discharge of a public duty, that

"he must take his property, subservient to the con-
"venience of the demandant who desires it for another
"public use."

The Court, in that case, further said:—

"The Railroad Company is held off by its contract
"from constructing its line of telegraph on that portion
"of its right of way which it prefers, and which it has
"selected, until the contract expires; and the Telegraph
"Company should not be given a preference, because it
"is not fettered by the same contract, in proceeding to
"condemn the same portions of the railroad right of
"way."

This decision by the highest Court of the State of Georgia rested, not on a question of priority of selection, but on a preferential right. Its decree was rendered July 11th, 1912, but though it was brought to the attention of a Court in the trial of this case three weeks later, that Court declined to follow it and said to the jury (Record, page 143):—

"I charge you that the Telegraph Company is entitled
"under the law of the State of Louisiana and the Fed-
"eral Statutes, to this right of way."

The Georgia Court, more than two years later, on September 30th, 1914, adhered to, and reaffirmed, its decision, in the cases of Nashville C. & St. L. Ry. *vs.* Western Union Telegraph Co., 83 S. E., 123, and Louisville & Nashville R. Co. *vs.* same, Ib., 126.

The Railroad Company, at the present time, is in the possession of its own right of way. The present occupancy by the Telegraph Company is as its tenant, and not as the result of any independent action.

The Railroad Company wishes to locate upon the site of the present poles and wires, other poles and wires which the voluntary action of the Telegraph Company makes it necessary for it to construct and to string.

It certainly is not compelled to do its telegraph business through the Western Union. It would be exceedingly ex-

pensive, and would amount to a relinquishment of its complete control of its operations.

The Telegraph Company says that because it has its poles and wires already constructed, it should be permitted to retain them where they are now located, although its duty under its contract was to remove them.

There is necessary coincidence in the site selected by the Railroad Company because the place of location is the best for its purposes. It was originally chosen under the contract of 1884 because of that fact.

It should not be compelled to fill up some of the marshy ground in order to obtain a new site for its poles and wires, when it has better ground belonging to it which it can occupy for the purpose.

The Telegraph Company admitted that its construction was somewhat ancient; but it prefers not to make a new one because of the expense which will be entailed.

The Railroad Company is particularly desirous to maintain control of its bridges over navigable streams—bridges which it constructed at a large expenditure. For an exceedingly small sum the Telegraph Company wishes to avail itself of this construction.

Why should the Railroad Company give preference to the Telegraph Company in a use of its right of way necessary for its telegraph purposes in such way as will best accomplish such purposes?

As between the Railroad Company, in possession of the right of way, for which it paid and which it constructed, and needs for its purposes, and the Telegraph Company which can locate elsewhere, and which was not compelled to remove, which has the best right?

Under the Act of 1866, the Telegraph Company could not occupy, without consent of the Railroad Company. The latter is unwilling to give its consent; but desires to occupy for its own purposes. What was done by the Telegraph Company which ousted the right of the Railroad Company, when the former saw fit to terminate its contract, to construct its poles and wires at a place best adapted for its purposes?

At the present time the Telegraph Company, if it has any right at all, has nothing more than a right to occupy under conditions, upon terms of compensation; but it can only occupy that which is not needed at the present time by the Railroad Company for its own purposes—the purposes for which it appropriated the right of way.

The theory of the Telegraph Company seems to be that from the moment it notified the Railroad Company it intended to occupy the site it has insisted upon, the latter lost all control over the same, and was obliged to seek another site for the erection of that which was necessary for its business, and for the purpose which it was authorized to transact, in the way of commercial telegraphing.

III. THE CONSIDERATION OF THE CONGRESSIONAL LEGISLATION REGULATING THE USE OF RIGHTS-OF-WAY OF RAILROAD COMPANIES IN CONNECTION WITH THE POWER OF THE STATE TO AUTHORIZE THE APPROPRIATION OF ANY INTEREST IN THE SAME BY A TELEGRAPH COMPANY.

We have discussed this subject as thoroughly as we deem necessary in the brief already filed.

On the 15th of June, 1866, what is known as "The "Railroad Act" was enacted by Congress, which, for the first time, asserted its right to regulate railroads under the commerce clause of the constitution (Section 5258, Revised Statutes).

In the case of Railroad *vs.* Richmond, 86 U. S., 584, this Court said:—

> "These Acts were passed under the power vested in "Congress to regulate commerce among the several "States, and were designed to remove trammels upon "transportation between different States which have "previously existed, and to prevent a creation of such "trammels in future, and to facilitate railway transpor- "tation by authorizing the construction of bridges over "navigable waters of the Mississippi; and they were "intended to reach trammels interposed by State enact-

"ments or by existing laws of Congress. * * *
"The power to regulate commerce among the several
"States was vested in Congress in order to secure equal-
"ity and freedom in commercial intercourse against dis-
"criminating State legislation."

The Act has been considered in this Court in the following cases:—

Bowman *vs.* Railroad, 125 U. S., page 465;
Dubuque R. R. Co. *vs.* Richmond, 86 U. S., page 590;
C. & N. W. R. R. Co. *vs.* Fuller, 84 U. S., 570;
Ill. Central R. R. Co. *vs.* State of Ill., 163 U. S., 142;
G. C. & S. F. Ry. Co. *vs.* Hefley, 158 U. S., page 99;
N. Y. R. Co. *vs.* State of New York, 165 U. S., page 628;
Lake Shore & M. S. R. Co. *vs.* Ohio, 173 U. S., page 286;
Mo. R. Co. *vs.* Haber, 169 U. S., page 613;
Union Pac. R. Co. *vs.* Chicago R. Co., 163 U. S., page 591.

In the Debs case, 158 U. S., page 579, this Court went so far as to say that under this Act it is competent for the National Government to remove all obstructions on highways, natural or artificial, to the passage of interstate commerce for the carrying of the mail and that this may be accomplished by direct force through the executive branch and in the use of the entire executive power of the nation.

In the Illinois Central case, 163 U. S., page 152, this Court said:—

"The State can do nothing which will directly bur-
"den or impede the interstate traffic of the company
"or impair the usefulness of its facilities for such traf-
"fic."

The Telegraph Act was passed a few days after the Railroad Act was passed and has been construed by this Court in the following leading cases:—

Pensacola Teleg. Co. *vs.* Western Union Teleg. Co. 96 U. S., page 1;
Western Union Teleg. Co. *vs.* Ann Harbor R. R. Co., 178 U. S., 239;
Western Union Teleg. Co. *vs.* Penn. R. R. Co., 195 U. S., 559;
Western Union Teleg. Co. *vs.* Attorney General 125 U. S., page 530;
St. Louis *vs.* Western Union Teleg. Co., 148 U. S., page 93;
United States *vs.* Union Pacific R. Co., 160 U. S., page 1.

In all of these cases it has been held that the Telegraph Company Act gave Telegraph Companies the right to occupy a railroad right of way, only by the consent of the railroad company.

The Western Union, in its petition, asserts that it has the right to maintain and operate its telegraph lines on the railroad right of way, though at the time of the filing of the petition its contract right was about to expire and it seeks in its petition to continue the maintenance of its lines thereon. Its occupancy at that time, conformed to the provisions of the Act of Congress, because it was there with the consent of the Railroad Company, the line being already constructed and in operation. In its petition it says, utterly without warrant, that it cannot procure the consent of the Railroad Company to maintain and operate its lines on the Railroad right of way at the expiration of the contract. The Act of Congress covers the construction, maintenance and operation of telegraph lines on a railroad right of way but it is silent as to the question of condemnation for original construction. This Court having held that the matter of telegraph companies acquiring the right to construct its lines on railroad right of way must be a matter of contract

or consent, the Western Union, failing to procure this consent, in it spetition, asked the Court, under the Acts of Louisiana to condemn this consent. The Louisiana Act provides for the construction (by condemnation), operation and maintenance of telegraph lines along and parallel to railroad rights of way, while the Act of Congress provides for the construction (by consent), operation and maintenance of telegraph lines along railroad right of way. There is no necessity to invoke the Louisiana statute for the purpose of constructing a telegraph line, because the petition avers that the line has already been constructed on the railroad right of way with the consent of the railroad company and is now being operated and maintained in accordance with the provision of the Act of Congress. Congress has covered the entire domain of the *construction, operation and maintenance* of telegraph lines on railroad right of way extending from State to State and this supercedes all State statutes on the subject and is a declaration, on the part of Congress, that such interstate highways shall be free from invasion "under State authority" and that they shall only be occupied by telegraph lines when the Railroad Company consents to the same.

In the present case, under the ruling of the Court from which the present appeal has been taken, notwithstanding the claim is substantiated by evidence that the operations of the Railroad Company would be obstructed, the Telegraph Company has been permitted to expropriate a portion of the Railroad right of way. This is done under State legislation, with the result that the operations of an interstate commerce railroad highway are interfered with.

Congress has withheld from the Telegraph Company the right compulsorially to enter upon the railroad right-of-way, and has approved of the use of the latter by the Railroad Company in interstate commerce. How can the State confer the right which Congress has denied?

The business which is transacted by the Telegraph Company is local as well as interstate. The right of expropiration is granted, *inter alia*, for State purposes.

IV. THE QUESTION OF THE RIGHT OF TELEGRAPH COMPANY TO EXPROPRIATE ANY PART OF THE RAILROAD COMPANY'S BRIDGES ACROSS NAVIGABLE STREAMS OR WATERS IN LOUISIANA.

This subject has also been so elaborately discussed in the brief already filed that it is not deemed necessary to add anything further thereto.

The Act of 23d March, 1906, referred to by the Telegraph Company as a foundation for its argument, has no applicability.

The Act referred to deals with future construction and maintenance of bridges across the navigable streams of the United States. The bridges in controversy were constructed before the passage of that Act.

The defendant in Error can derive no benefit from the part of Section 2, which it quotes, reading thus:—

> "And the United States shall have the right to con-
> "struct, maintain and repair, without any charge there-
> "for, telegraph and telephone lines across and upon said
> "bridge and its approaches."

In what way can it profit by the concluding portion, reading thus:—

> "And equal privileges in the use of said bridge and
> "its approaches shall be granted to all telegraph and
> "telephone companies."

This portion of the Act does not say that privileges must be granted; but that as to all bridges thereafter constructed one telegraph and telephone company shall not be preferred over another. The privileges granted to them must be equal.

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United States Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 183.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

versus

WESTERN UNION TELEGRAPH COMPANY,
Defendant in Error.

U. S. Circuit Court of Appeal for the Fifth Circuit.

BRIEF ON BEHALF OF THE WESTERN UNION TELEGRAPH COMPANY, DEFENDANT IN ERROR.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 183.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VERSUS

WESTERN UNION TELEGRAPH COMPANY,
DEFENDANT IN ERROR.

U. S. CIRCUIT COURT OF APPEAL FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF THE WESTERN UNION TELEGRAPH COMPANY, DEFENDANT IN ERROR.

Statement.

This is a suit instituted by the plaintiff below to expropriate a right of way for its telegraph line along and parallel to defendant's railroad between New Orleans and Pearl River in the State of Louisiana. The plaintiff, the Western Union Telegraph Company, is a corporation organized under the laws of New York for the purpose of transmitting intelligence by telegraph, and the suit is brought under the terms of Act

No. 124 of the Acts of the General Assembly of the State of Louisiana for the year 1880, reading as follows—to wit:

"An act to amend and re-enact section six hundred and ninety-six of the Revised Statutes of the State of Louisiana, relative to telegraph companies.

"SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That section six hundred and ninety-six of the Revised Statutes of the State, as now in force, be and the same is hereby amended and re-enacted so as to read as follows:

"SECTION 696. 'Corporations chartered or formed under the laws of this or of any other State, or under the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone or other system of transmitting intelligence, the equivalent thereof which may be hereafter invented or discovered, may construct and maintain such telegraph, telephone or other lines necessary to transmit intelligence along all state, parish or public roads or public works, and along and parallel to any of the railroads in the State, and along and over the waters of this State; provided, that the ordinary use of such roads, works, railroads and waters be not thereby obstructed, and along the streets of any city, with the consent of the council or trustees thereof, and such companies shall be entitled to the right of way over all lands belonging to the State and over the lands, privileges and servitudes of other persons and corporations, and the right to erect poles, piers, abutments and other works necessary for constructing, working, operating and maintaining their lines and works, upon making just compensation therefor. That in the event such company shall fail, on application therefor, to secure such right by consent, contract or agreement upon just and reasonable terms, then such companies or corporations shall have the right to proceed to expropriate the same, as provided in and by the laws of the State, relative to expropriation of lands for railroads and other works of public utility, and shall so construct their works as not to impede or obstruct the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised. But no company operating under the provisions of this act shall have the power to contract with the owners of land or with any other corporation for the right to erect and maintain any telephone, telegraph or other line for the speedy transmission of intelligence over his or its lands,

privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this act.'

"SEC. 2. Be it further enacted, etc., That this act shall be in force from the date of its passage and promulgation."

The "laws of the State relative to the expropriation of lands for railroads and other works of public utility" referred to in the foregoing act are the articles of the Civil Code of this State prescribing the procedure to be followed in expropriation suits, in regard to which no question is made in this Court.

The suit resulted in a verdict in accordance with the prayer of plaintiff's petition, the damages being assessed at the sum of six thousand dollars ($6,000).

Upon this verdict a judgment was entered to review which a writ of error was obtained from the Circuit Court of Appeals for the Fifth Circuit.

To review a judgment of that court affirming the judgment of the Circuit Court, this writ of error was obtained.

Assignments of Error.

The following are, as we understaud, the assignments of error now relied upon:

That the Court erred in refusing defendant's motion to direct a verdict in its favor made at the conclusion of all the evidence:

1. Because the plaintiff at the time this suit was instituted was not authorized to operate a telegraph system in Louisiana.

2. Because the defendant was entitled to a preferential right for telegraph purposes to the particular location or route sought to be expropriated by the plaintiff.

I.

The Claim that the Western Union Telegraph Company was not Authorized at the Time the Suit was Instituted to Own and Operate a Telegraph Line in Louisiana.

This claim is based upon the contention that under the terms of its charter and the laws of the State of New York, under which it is incorporated, the Western Union Telegraph Company was not authorized to acquire, own or operate a telegraph line in Louisiana, and upon the decision of the Supreme Court of this State—in the case of Southwestern Telegraph Company vs. Kansas City, Shreveport & Gulf Railway Company, 108 La., 686 (32 S. Rep., 958), to the effect that the statute of this State, under which this suit was instituted, cannot be availed of by a foreign corporation where, by the law of the State creating it, it is prohibited in express terms, or by implication, from operating in Louisiana.

We submit that this claim is without merit for two reasons:

(*a*) Because it is not true that under its charter and the laws of the State of New York, under which it is incorporated, the Western Union Telegraph Company was, at the time this suit was instituted, prohibited in express terms or by implication from operating in Louisiana.

(*b*) Because, in any event, under the Act of Congress of July 24th, 1866, the Post Roads Act, the benefits of which had been expressly accepted by the Western Union Telegraph Company, that company was authorized to conduct its business in Louisiana.

(*a*)

In order to determine whether the Western Union Telegraph Company was at the time this suit was filed prohibited in express terms or by implication by the laws of the State of New York, under which it is organized, from operating in Louisiana, a consideration of those laws is necessary, and for the convenience of the Court we have appended to this brief complete printed copies thereof.

It will be observed that the Act of April 12th, 1848, under which the plaintiff was originally incorporated under the name "New York and Mississippi Valley Printing Telegraph Company," authorized the incorporation of telegraph companies only "for the purpose of constructing a line of wires of telegraph through this state (New York) or from and to any point within this State (New York)" (Section 1 of Act of April 12th, 1848). When, therefore, on April 1st, 1851, the plaintiff was incorporated with a view to constructing and operating a line of telegraph between Buffalo, in the State of New York, and St. Louis, in the State of Missouri, it was recognized that under its New York charter the company could not operate beyond the limits of the State of New York, and accordingly after the designation of the proposed route of the line in the State of New York in Article 2 of the articles of incorporation it was provided in Article 3:

> "This Company shall own and operate the residue of said telegraph line from the boundary of the State of New York through the several states to the City of St. Louis, touching at Cleveland, Columbus and Cincinnati, and thence to St. Louis by such route as shall be designated by the directors, to be constructed by the said Sanford J. Smith and Isaac Butts under and by virtue of authority from said States, respectively, or from persons whose lands the said line may cross."

On April 8th, 1851, the act of that date entitled "An Act to amend an act entitled, 'An act to provide for the incorporation and regulation of telegraph companies passed April 12th, one thousand, eight hundred and forty-eight,'" was passed. By the terms of this Act of 1851 it was provided:

> "The directors or trustees of any telegraph company formed or incorporated under the Act entitled, 'An act to provide for the incorporation and regulation of telegraph companies, passed April 12th, one thousand, eight hundred and forty-eight,' may at any time, with the written consent of the persons owning two-thirds of the capital stock of such company, extend their line of telegraph, or may construct branch lines to connect with their main lines, or may unite with any other incorporated telegraph company."

Construing this act in connection with the original Act of 1848, and the Statutes subsequently enacted, it is clear that it authorized upon the conditions stated simply the extension of their lines or the construction of additional branch lines within the limits of the State of New York by companies organized under the original Act of 1848 or the consolidation by such companies with other companies organized under the same act. It did not authorize at all the operation by such companies beyond the limits of the State of New York.

On June 29th, 1853, the Act of that date was passed entitled:

> "An act to amend an act entitled, 'An Act to provide for the incorporation and regulation of telegraph companies passed April 12th, one thousand, eight hundred and forty-eight."

This was the first act of the State of New York which authorized the incorporation of telegraph companies to do business beyond the limits of the State of New York. By the terms of Section 1 of this Act it was provided:

> "Any number of persons may associate, for the purpose of owning or constructing, using and maintaining a line or lines of electric telegraph, whether wholly within or partly beyond the limits of this State; or for the purpose of owning any interest in any such line or lines of electric telegraph, or any grants therefor, upon such terms and conditions, and subject to the liabilities prescribed in the act passed April twelfth, one thousand, eight hundred and forty-eight, entitled, 'An Act to provide for the Incorporation and Regulation of Telegraph Companies.' And such association shall, upon complying with the provisions of said act, become a body corporate, and shall have the powers, and be subject to the provisions in the said act, and in the several acts amending the same, contained, not inconsistent herewith. And any telegraph company now owning or using any telegraph line, either wholly or partly within this State, may become a body corporate, and entitled to the benefit of the provisions herein contained, on filing in the office of the secretary of state a certificate of a resolution adopted by a majority of its Board of Directors to organize under this act; which

said certificate shall contain the specifications required by the said recited act, and shall be proved or acknowledged, and recorded in the manner therein prescribed."

It will be observed that under the terms of Section 1 of the Act of 1853, quoted above, all that was required in order that a telegraph company then owning or using any telegraph line either wholly or partly within the State of New York might become a body corporate and entitled to the benefit of the provisions of the said Act of 1853, was that it should file in the office of the Secretary of State a certificate of a resolution adopted by a majority of its Board of Directors to organize under the said act, which said certificate must contain the specifications required by the said recited act and be approved or acknowledged and recorded in the manner therein prescribed, and a reference to Section 2 of the Act of 1848 will show that the specifications of the said certificate so required were:

1st. The name assumed to distinguish such association and to be used in its dealings and by which it may sue and be sued.

2nd. The general route of the line of telegraph designating the points to be connected.

3rd. The capital stock of such association and the number of shares into which the stock shall be divided.

4th. The names and places of residence of shareholders, and the number of shares held by each of them, respectively;

5th. The period at which such association shall commence and terminate.

It will be further observed that for the purpose of obtaining the benefits of this Act of 1853 no consent of the persons owning two-thirds of the capital stock of the company was required either expressly or by reasonable implication.

Thereafter, on January 20th, 1854, as appears on pages 171, *et seq.*, of the transcript, the plaintiff, under its then name, New York and Mississippi Valley Printing Telegraph Company, through its Board of Directors, took all the necessary proceedings to become a body corporate under the Act of June 29th, 1853, and to obtain the benefit of the provisions of that act.

The route designated in the resolutions so adopted, how-

ever, did not include the State of Louisiana, so that the plaintiff did not thereby acquire the right under the laws of the State of New York to do business in Louisiana.

By an act of the Legislature of the State of New York, passed on April 4th, 1856, the name of the plaintiff was changed from New York and Mississippi Valley Printing Telegraph Company to Western Union Telegraph Company.

On April 22d, 1862, the act of the Legislature of the State of New York of that date was passed, which we rely upon as evidencing plaintiff's right to do business in Louisiana.

Sections 1 and 2 of this Act read as follows :

> " Any telegraph company which is duly incorporated under and in pursuance of the act entitled, ' An Act to provide for the Incorporation and Regulation of Telegraph Companies,' passed April twelfth, eighteen Hundred and Forty-eight, may construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of this State, and may join with any other corporation or association in constructing, leasing, owning, using, or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon the terms and conditions and subject to the liabilities prescribed in said act, so far as such provisions are applicable to the construction, using, maintaining, owning or holding of telegraph lines, or any interest therein, pursuant to the provisions of this act.
>
> " SECTION 2. In case any company incorporated as before mentioned shall become the owners or lessees of, or engaged in the construction, use or maintenance of any line or lines of electric telegraph, not described in their original certificate of organization, or shall join with any other corporation or association in leasing, constructing, owning, using or maintaining any such line or lines, or shall own or hold any interest in such line or lines, or shall become lessee of any such line or lines, such company, within one year after constructing or becoming such owners or lessees, or after joining with any other corporation or association in such construction, leasing or ownership, or rather acquiring any other interest in such line or lines shall file in the office of the secretary of state of this State a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as pro-

vided in Section Two of the act hereby amended; which certificate shall be executed by at least two-thirds of the directors of such corporation under their hands and seals, and shall be acknowledged by them as prescribed in subdivision five of the second section above mentioned."

It is quite clear that under the terms of Section 1 of this Act of April 22d, 1862, above quoted, any telegraph company duly incorporated under the original act of 1848, was authorized to construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of the State of New York, and that this section required no action whatever upon the part of the company as a condition precedent to the exercise of the said right.

The words in said section, " upon the terms and conditions and subject to the liabilities prescribed in said act " manifestly import simply that as to such additional lines as such company might construct under the permission granted by the said section, the company should be bound by the various provisions of the original Act of 1848, regulating the duties and liabilities of companies organized thereunder. That these words in Section 1 were not intended to require, as a condition precedent to the right of the corporation to construct such additional lines, that it should comply with the affirmative conditions precedent prescribed in the Act of 1848, is clear in view of the terms of Section 2 of the said act, which provided :

" In case of any company incorporated as before mentioned shall become the owners or lessees of, or engaged in the construction, use or maintenance of any line or lines of electric telegraph not described in their original certificate of organization * * * such company within one year after constructing or becoming such owners or lessees * * * shall file in the office of the secretary of state of this State a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as provided in Section 2 of the act hereby amended ; which certificate shall be executed by at least two-thirds of the directors of such corporation under their hands and

seals, and shall be acknowledged by them, as prescribed in subdivision 5 of the second section above mentioned."

In other words, whereas, under the Act of 1848, the filing of the certificate referred to in Section 2 of the Act of 1862, was a condition precedent to the right of a company organized thereunder, to do business under the Act of 1862, as regards the additional lines authorized under the terms of Section 1 of the said act to be constructed and maintained no such condition precedent was prescribed, it being simply directed without provision of any penalty, that within one year after the construction of such additional lines the certificate in question should be filed in the office of the Secretary of State.

It will be observed that the requirement of the Act of 1862 in regard to the filing of the certificates in question is not even made in the form of a condition subsequent. The right to construct the additional lines is not granted upon condition that within one year after such construction the certificate in question shall be filed. The provision in regard to the filing of the certificate is purely directory. It is simply provided without provision for any penalty that within one year after the construction of such additional line or lines, the company shall file in the office of the Secretary of State the certificate in question. And under these circumstances we submit that it is impossible to affirm that the right of a corporation organized under the original Act of 1848, to own, use and maintain such additional lines of telegraph as it may have constructed under the permission granted by Section 1 of the Act of 1862, would be affected, at least as regards any person other than the State of New York, by the fact that it had failed within one year after the construction of the said line or lines to file with the Secretary of State the certificate required by Section 2 of the said act.

And in any event whatever may be said with regard to the authority *vel non* of the plaintiff to do business in Louisiana in the past, it is quite clear that independently entirely of this question the plaintiff at the time that it instituted this condemnation suit, was authorized, under the Act of 1862, to acquire, own and operate a telegraph line in Louisiana subject to the condition subsequent that within one year after its said

acquisition it would file with the Secretary of State of the State of New York the certificate required by Section 2 of the Act of April 22nd, 1862.

It seems to us impossible, therefore, to affirm that at the time this suit was instituted the plaintiff was not authorized under its charter and the laws of the State of New York to acquire, own and operate a telegraph line in the State of Louisiana.

And in this connection we call attention to the fact that this precise question has been decided in accordance with the view herein expressed by at least two Courts, to wit: the United States District Court for the Western District of Kentucky and the Circuit Court of Carroll County, Tennessee.

In the case of Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, a condemnation suit similar to the one at bar, instituted under the Kentucky Statute, the United States District Judge of the Western District of Kentucky had occasion to deal with the question in a memorandum opinion handed down by him in connection with the judgment upon various demurrers filed by the Western Union Telegraph Company to various paragraphs of the answer filed in the said suit by the Louisville & Nashville Railroad Company. In this opinion, which has not been published, the Court said:

> "It is insisted, also, that the plaintiff, which is a New York Corporation, has not shown itself to possess authority under the laws of that State to call into exercise the powers of the State of Kentucky for the purpose indicated by the petition. We cannot agree that the statute of Kentucky is not broad enough to embrace a telegraph company with the powers given the plaintiff by the State of New York and this conclusion is emphasized in its application to this case by the recognition of the plaintiff as a corporation by the defendant, which has had large dealings with the plaintiff over a period of more than twenty-five years. Besides the failure of the plaintiff to perform any condition subsequent exacted by the New York statute does not *per se* avoid its powers, however much it might at the option of the State of New York be subjected to *quo warranto* proceedings. The State of New York might complain of the failure, if any, of the defendant to perform the condition subsequent referred to in the argument, or at

its option it might condone the fault, but it does not, under the circumstances of this case, appear to lie in the mouth of the defendant to complain of any failure of that sort, especially in view of its long course of dealings with the plaintiff on a contrary basis."

This precise question was considered by the Circuit Court of Appeals of the Sixth Circuit on the appeal and its conclusions are as follows:

"HAS APPELLEE CHARTER POWER TO CONDEMN THE LANDS IN QUESTION?

Appellee was incorporated under the New York telegraph act of 1848 (Laws 1848, c. 265), which provided for such organizations for the purpose of owning, constructing, using and maintaining lines of electric telegraph wholly within or partly beyond the limits of the state. Previous to 1862, according to its articles of incorporation, its line (so far as concerns the lines under consideration here) extended only from Cincinnati, through Covington, Georgetown and Frankfort to Louisville, with a branch to Lexington. In 1862 (Laws 1862, c. 425) the telegraph statute was so amended as to authorize any telegraph company incorporated under it to own, construct, use, and maintain any line or lines of electric telegraph not described in the original certificate of organization, whether wholly within or wholly or partly beyond the limits of the state of New York, upon the terms and conditions and subject to the liabilities prescribed in the original act, so far as applicable. In case of such construction, ownership, use, or maintenance of lines not described in the original certificate of organization, the company was required, within one year after such construction or acquirement of ownership, to file in the office of the Secretary of State of New York a certificate to be executed and acknowledged by at least two-thirds of the directors of the corporation, describing the general route of the line, and designating the extreme points connected thereby. No certificate covering the route in question seems to have been filed, and appellant now insists that appellee is without power to construct and operate the line in question, and so cannot take the benefit of the statutes of Kentucky and the other states involved, which grant the right of eminent domain for purposes of such construction and mainten-

ance, because prohibited by the state of New York from extending its operations beyond the limits stated in its articles of incorporation. It may be conceded that if appellee is prohibited by the laws of New York from owning, constructing, operating, and maintaining the telegraph lines in question, such prohibition would be available as a defense to one whose lands are proposed to be taken away without his consent. Case v. Kelly, 133 U. S., 21, 23, 10 Sup. Ct., 216, 33 L. Ed., 513; United States v. Northern Pacific R. R. Co., 152 U. S., 284, 300, 14 Sup. Ct., 598, 38 L. Ed., 443; Tulare Irrigation District v. Shepard, 185 U. S., 1, 7, 22 Sup. Ct., 531, 46 L. Ed., 773; Atkinson v. Marietta & Cincinnati Ry. Co., 15 Ohio St., 21. But does this prohibition appear? The failure to file the certificate of extended route does not have the effect of destroying the incorporation of the telegraph company. We may therefore lay out of account such decisions as deny the right of eminent domain to a mere *de facto* corporation. Nor is appellee without specific authority to extend its lines over the route in question. On the contrary, such authority is expressly conferred by the statute of appellee's creation. The only alleged infirmity is that the extended route has not been certified to the New York state authorities, as required by the act. But such certification is not made a condition precedent to the right of extension. To the contrary, permission to so extend previous to any certification thereof, or of intention to do so, is necessarily implied. It follows that if appellee's right to extend its lines over the existing routes is to be tested as of the time of its application to condemn for the purpose, a contravening of the New York statute could not be claimed, for that statute requires no certification until after the construction, etc. If, however, the date of original construction and operation of the lines is to be taken, the question then is, Has the right to continue such ownership and operation been lost; and, if so, how? The statute does not declare that the failure to certify the extended route within the designated period shall *ipso facto* work forfeiture of the right to continue the ownership and operation of such extended lines. Nowhere in the original act, or in the amendment of 1862, nor in any previous amendment to which our attention has been called, is there any provision whatever by way of penalty for failing to make such certification. In these circumstances, we think the applicable rule is that appellee's failure to make the certificate did not, *ipso facto*, terminate appellee's rights; that the state of

New York alone is concerned with the enforcement of this condition subsequent, and may either enforce it or waive it, as it may deem best. It follows that it does not lie with appellant to set up appellee's default in the respect stated as a defense to the condemnation proceedings. The following authorities are more or less pertinent to the subject: Matter of New York, etc., Bridge Co. v. Smith, 148 N. Y., 540, 546, 42 N. E., 1088; Briggs v. Cape Cod Ship Canal, 137 Mass., 71; Brown v. Wyandotte, etc., Ry. Co., 68 Ark., 134, 139, 56 S. W., 862, and following; Coe v. Gregory, 53 Mich., 19, 18 N. W., 541.

"The line of authorities holding that under the National Banking Act the only penalty for violation of certain administrative features of the act is forfeiture of the charter, while not strictly in point, have some bearing upon the general principles involved here" (Louisville & Nashville R. Co. vs. Western Union Tel. Co., 207 Fed. Rep., pp. 12, 13, 14).

And in the case of Western Union Telegraph Company vs. Nashville, Chattanooga & St. Louis Railway Company *et al.*, being a suit of the same nature, the Judge of the Circuit Court of Carroll County, Tennessee, in an opinion rendered on November 9th, 1912, used this language:

"The Court is of the opinion that the copy of its charter filed by the petitioner with the Secretary of State of Tennessee is a substantial compliance with the laws of Tennessee in requiring foreign corporations to file their charters with the Secretary of State before doing business in Tennessee, and that the petitioner is authorized by the laws of New York, and of Tennessee to prosecute this suit for condemnation. The Court is also of the opinion that under the Act of 1862 of the State of New York petitioner has twelve months after acquiring in this State a line with which to do business to file with the Secretary of State of New York the certificates required by the said act."

We submit, therefore, that there is no merit in plaintiff's assignment of error in so far as it is based upon this ground.

(b)

In the alternative and in any event, we submit that the plaintiff at the time this suit was instituted was entitled to operate in this State under the terms of and by virtue of the Act of Congress of July 24th, 1866, the Post Roads Act, the benefits of which it had formally accepted.

Counsel for the defendant in their brief in the Court below were at pains to demonstrate that the Act of Congress in question confers upon a telegraph company, which has accepted its terms, no right of expropriation. This we fully and freely concede. Plaintiff's right of expropriation is derived solely from the State statute. The question involved here is, however, fundamentally different, viz., whether the Act of Congress confers upon a corporation which has accepted the benefits of the act a right to transact business in the State. We submit that it does.

That under the commerce clause of the Federal Constitution it is within the constitutional power of Congress to affirmatively confer upon a corporation engaged in interstate commerce the right to transact business in any State, will, we assume, be admitted. And that the Act of Congress in question does confer such a right upon corporations which have accepted the benefits of its provisions, has, we submit, been decided in effect by this Court.

In the case of Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S., 1, in which the validity of an act of the Legislature of the State of Florida, purporting to grant to the Pensacola Telegraph Company the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the Counties of Escambia and Santa Rosa in the said State, was involved, this Court had occasion to consider the effect of the Act of Congress of July 24th, 1866, in this connection. The question was as to the right of the Western Union Telegraph Company, the plaintiff in this case, to operate in the counties in question. The question might perhaps have been decided independently of the provisions of the Act of Congress of July 24th, 1866, upon the ground simply that inasmuch as the Western Union Telegraph Company was engaged in interstate commerce, without regard to any grant in this respect from Congress, it was incompetent for the State of

Florida to exclude it from doing such business in any portion of the State. The decision was not pitched, however, upon this ground, but upon the ground that under the terms of the Act of Congress the benefits of which had been accepted by the Western Union Telegraph Company, it had acquired an affirmative grant of a right to do business in the State. Referring to the act of the Legislature of Florida which was in question, the Court said:

> "It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24th, 1866, in effect amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction if they accept the terms proposed by the national government for this national privilege. To this extent certainly the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erecting the necessary structures for its business; but it does provide that w henever the consent of the owner is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And in the case of Western Union Telegraph Company vs. Wright, 185 Fed., 250, the Court of Appeal for the Fifth Circuit distinctly held that the purport and effect of the Act of Congress of July 24th, 1866, was to confer a franchise upon corporations which had accepted the benefits of its provisions to use the military or post roads of the United States, including all railroads wherever situated for the purposes of its business.

We submit, therefore, that insofar as is concerned the right of the plaintiff in this case at the time this suit was instituted to own and operate in this State a line of telegraph along the right of way of the Louisville and Nashville Railroad Company, the right was not merely conferred by the laws of the State of New York under which the plaintiff was organized as a corporation, but also by the Act of Congress of July 24th, 1866, the benefits of which had been accepted by the plaintiff.

And inasmuch as the statute of this State under which the suit was brought certainly authorized the expropriation of a right of way along and parallel to any railroad in the State by any telegraph company which is authorized legally to operate such line of telegraph in this State, we submit that there is no merit in the contention of defendant's counsel that the plaintiff was not entitled to avail itself of this statute.

The decision of the Supreme Court of this State in the case of Southwestern Telegraph Company vs. Kansas City Shreveport & Gulf Railway Co., 108 La., 688, is wholly inapplicable.

II.

The Claim that the Defendant was Entitled to a Preferential Right for Telegraph Purposes to the Particular Location or Route Sought to be Expropriated by the Plaintiff.

The following are the facts in relation to which this claim is to be considered:

The route sought to be expropriated in this case is that presently occupied by the plaintiff. The line was built many years ago and has been maintained and operated up to the date of the filing of this suit under the terms of a contract between the plaintiff and the defendant. This contract being about to expire, the plaintiff, in accordance with the requirement of the statutes of this State that before the filing of an expropriation suit an attempt shall be made to agree with the defendant as to the terms upon which the right desired may be obtained,

addressed, through its counsel, to the defendant, the communication appearing at pages 194 and 195 of the transcript, in which it advised the defendant of its desire to acquire the right to maintain, after the expiration of the said contract, its existing telegraph line, and made an offer of a price which it was willing to pay for the said right. This communication was dated March 16th, 1912. It is admitted that no reply was vouchsafed thereto (Tr., page 68). Accordingly, on April 12th, 1912, this suit was filed in the Civil District Court for the Parish of Orleans, State of Louisiana. Various proceedings were had in the State Court, all tending to delay the progress of the suit which finally resulted in removal of the suit to the United States District Court. This removal was effected on June 17th, 1912. The case was finally set for trial on August first in the District Court. On July 29th the defendant appeared and filed numerous exceptions. These exceptions were taken up on August first, the date upon which the case was set for trial, and were overruled. Thereupon the defendant filed its answer in which, among other numerous defenses, there was set up for the first time the defense now insisted upon here, that the defendant desired to use and was entitled by preference to use for telegraph purposes the particular route along its right of way which was sought to be expropriated by the plaintiff, and in support of this defense there was adduced evidence to the effect that after the institution of the present suit, one of the defendant's engineers, acting under instructions received from some undisclosed officer or representative of the defendant company, had proceeded to locate for the defendant the route of a proposed telegraph line on its right of way between New Orleans and Pearl River, and had located for this purpose the exact route which had been occupied for years by the defendant, and which the defendant was seeking to expropriate in this suit. There was further adduced evidence to the effect that this particular route had been so selected by this engineer for the reason that it was considered the best route in view of the fact that the ground of the particular portion of the right of way so located was somewhat firmer than on the other side of the railroad track.

It will be observed that no evidence of any corporate action by the defendant corporation in this connection was adduced. No evidence of the intention of the defendant to

really build a telegraph line of its own along its right of way was adduced except the testimony of the engineer in question that he had been directed by some officer of the company, after the institution of the present suit, to locate a route for such a line. And no justification, whatever, for the selection of the particular route then occupied by the plaintiff was shown beyond the statement that the ground along that particular route was firmer than that on the other side of the track.

In this connection it further appeared from the uncontradicted testimony of witness, J. D. Hilbert, on behalf of the plaintiff, that it would be entirely practicable for the defendant if it desired to do so to build and operate another line of telegraph on the same side of the right of way as that occupied by plaintiff's line.

Upon this evidence it is claimed that it was the duty of the Court to direct a verdict in favor of the defendant.

We submit that this position is untenable.

We deny in the first place that in such a case as this the defendant had any such preferential right as is claimed. The statute of this State under which this suit is instituted provides that corporations chartered for the purpose of transmitting intelligence by telegraph may construct their lines along and parallel to any of the railroads in the State provided only "that the ordinary use of such roads be not thereby obstructed." Under the terms of this statute it is submitted that when a particular right of way for a telegraph line along a railroad in this State is sought to be expropriated by a telegraph company, the mere fact that after the institution of such suit the railroad company may have had located a route for a telegraph line of its own for railroad purposes identical with that which has been selected by the telegraph company, there being no evidence whatever that it really intends to build the line, will constitute no defense to the suit even if it be true that the particular route so selected for expropriation is somewhat more convenient than other available routes provided such other routes are available. Under such circumstances, we submit that the additional inconvenience to which the railroad company may be put in the matter of the construction of its own line of telegraph if it should ultimately determine to build the same is merely a matter to be considered by the

jury in the estimation of the damages to be assessed as against the telegraph company. And particularly is this true, we submit, where the route proposed to be expropriated by the telegraph company is one already occupied by it which it could not change without enormous expense.

It is true that in the case of Western & A. R. Co. vs. Western Union Telegraph Company, 75 S. E., 471, 138 G., 420, the Supreme Court of Georgia seems to have affirmed the preferential right claimed by the defendant in this case, where it appeared that the railroad company intended and purposed in good faith to construct a line of its own on the location of the old telegraph line which is shown to be located on an advantageous portion of the right of way.

This decision, however, has no binding force as authority upon this Court, and the question has been decided otherwise by another Court.

In the opinion of the United States District Court for the Western District of Kentucky in dealing with a demurrer filed by the Western Union Telegraph Company to a paragraph of the answer of the Louisville and Nashville Railroad Company, setting up the defense here under consideration, among others, said:

> "The Court is in some doubt as to what should be done with the general demurrer to paragraph thirteen of the answer, but has concluded to overrule it, although in doing so it by no means intends to intimate that it yields to the defendant's contention that the defendant has the right to choose what part of its right of way shall be taken by the plaintiff, or a right to any preference in respect to what it may itself intend hereafter to use for its own telegraph or telephone lines. Our view rather is that no such right or preference exists. The last clause of Section One of the act does not seem to confer any rights upon the defendants as to a non-existing telegraph line. The peculiar conditions actually existing in this instance greatly emphasize the view we take. Indeed, there would seem to be no justice in allowing the defendant to exclude the plaintiff from keeping its own poles where they now are when the right of way it has had and which it desires to hold shall be fully paid for through this action. The party seeking to condemn appears to be given the right to take what it desires, though this, of course, is subject

to the other provisions of the act. That is the object of the suit. The statute does not require that its right to take shall be made subordinate to any purpose of the owner. The important thing is giving the owner compensation for what in fact is taken. The taking of one particular part of a thing may involve greater compensation, including greater damages, but it does not otherwise affect or control the right to take what the plaintiff desires. It is largely because this paragraph may show certain things which possibly may more or less affect compensation that we overrule the demurrer to it."

In any event, however, we submit that the decision in the case of Western & A. R. Co. vs. Western Union Telegraph Company, *supra*, is inapplicable to the facts disclosed by this record.

It does not appear that the Louisville and Nashville Railroad Company intends and proposes in good faith to construct a line of its own on the location of the line presently occupied by the Western Union Telegraph Company.

As above stated, all that appears is that one of the engineers of the company was directed to locate a route for such a line. Whether the Louisville and Nashville Company purposes to build a line along the route so located does not appear.

It is submitted that the situation in this regard is the same as it would have been if evidence had been adduced of circumstances indicating merely that the Louisville and Nashville Railroad Company might in the future desire to build another track along that portion of the right of way sought to be expropriated. It is quite clear that this would have constituted no defense whatever to plaintiff's suit. The test to be applied in this connection under the terms of the Louisiana statute is simply whether the use by the telegraph company of the right of way sought to be expropriated will presently interfere with the ordinary use of the railroad.

The mere fact that this use may in the future be interfered with, in view of a necessity that may arise for the laying of additional track or the building of a telegraph line of its own, would constitute no valid defense, whatever. The possibility of such future interference is fully provided for in the judg-

ment rendered in this case, as it is in all such cases, by that clause of the judgment which reads as follows, to wit:

> "The whole of said line shall be so constructed and maintained as not to interfere with the use of its said right of way by the defendant for the purposes of its business of operating a railroad, and if at any time in the future it shall become necessary for the defendant to change the location of its tracks, or to construct new tracks or side tracks or other structures for the purposes of its said railroad business, and for such purposes to use and occupy the portion of the right of way on which plaintiff's telegraph line may be, then the plaintiff shall, at its own expense, upon reasonable notice from the defendant, remove its poles, cross-arms and wires to such other point or points on such right of way as may be reasonably designated by the defendant."

It is submitted that this record does not disclose that at this time the Louisville and Nashville Railroad Company purposes and intends in good faith to build a line of telegraph of its own along its right of way.

If it should in the future determine in good faith to build such line for railroad purposes, the question will then arise under the terms of the clause of the judgment in this case above referred to, whether the Western Union Telegraph Company, under the circumstances, can be compelled to remove its line from its present location.

Even in such event it seems to us unthinkable that upon evidence such as has been adduced in this case any Court would compel such removal. We submit, however, that this question is not presented for decision in this case.

So far from the record disclosing any *bona fide* intention upon the part of the Louisville and Nashville Railroad Company to build a telegraph line of its own on the right of way in question here, we submit that it is quite clear that this question has been injected into this case simply by way of subterfuge, and as a means of preventing or delaying the plaintiff company in obtaining the right of way to which, under the law, it is entitled.

In this connection it is to be observed that there is something more than a mere private interest involved here. The right of expropriation claimed by the plaintiff in this suit is

one granted not in the interest of the plaintiff corporation, but in the interest of the public, to which it is a matter of vital concern that the plaintiff should be enabled to discharge its functions as a public service corporation.

It is true, of course, that it is equally to the interest of the public that the defendant should not be interfered with in the performance of its duties as a public corporation. We submit, however, that it does not appear that an affirmance of the judgment, which has been rendered by the lower Court, will interfere to any appreciable extent with the use by the defendant of its property.

In the one case, if the judgment is reversed, the contract under which the plaintiff has occupied the right of way in the past having expired, it will be left without any legal right in the premises and will be disabled from performing its duties to the public at least until it shall have secured a judgment of condemnation in another suit, and even in such event, will be subjected to the enormous expense of entirely reconstructing its line.

On the other hand, if the judgment as affirmed, and even if it be conceded that the defendant will be under the necessity of constructing a line of telegraph of its own along the right of way, the most that can be said is that it may have to construct this line at a location on the right of way which would involve a trifle more expense than if it was constructed upon the exact route occupied by the plaintiff, and this, was, of course, a consideration which was considered by the jury in the estimation of the damages to which the plaintiff was entitled in the premises.

III.

The question of congressional legislation regulating the use of rights of way of railroad companies and whether a State can authorize the appropriation of any interest in the same by a telegraph company considered.

The principles announced in the authorities cited in the brief of plaintiff in error upon this question will not be dis-

puted in any respect. Their application, however, to the situation presented upon this record is the real question under this branch of the case, and defendant in error contends that they have no application to the case at bar for the reason that the Acts of Congress cited do not cover the questions involved in this case.

The first act cited simply regulates the operation of the railroad company by providing that it is authorized to carry upon its road passengers, troops, government supplies, mails, freight and property on their way from any state to another, and to receive compensation therefor, and to connect with roads from other states so as to form continuous lines for the transportation of the same, thus regulating their functions as interstate carriers, principally with respect to governmental service which may be required. This act does not in any respect even indirectly regulate or apply to the question of the right of a state to permit appropriation for a telegraph company for public use of a portion of the right of way of the railroad company not necessary for the use of the railroad company, and not interfering with the operation of the railroad.

The second Act of Congress referred to is the Act known as the Telegraph Act, approved July 24, 1866. This Act has been declared by this court again and again to be permissive in its nature, and to permit a telegraph company to construct its lines along post roads. The fundamental purpose of the Act, like the Act previously referred to is to secure, as far as such Act will enable the Government to secure, facilities for the transmission of telegraphic communications between the several departments of the United States and their officers and agents. Coupled with this was the privilege to the Government to purchase the telegraph lines.

This Act, again, does not in any way, either directly or indirectly, provide for any appropriation by telegraph companies under the power of eminent domain, either state or national, of the rights of way of railroad companies, as this court has repeatedly declared. If this Act had provided either the power of appropriation or the method of appropriation coupled with the power, it might be claimed by plaintiff in error that such power and method were exclusive in their nature. But the Act has not done so, and therefore the authorities cited by plaintiff in error in support of its propo-

sition under this Act, show that the Act does not and was not intended to cover that which is the subject matter of the case at bar, within the decisions of this court.

The same thing may be said with respect to the third Act, under which the railroad companies having telograph lines are authorized to use them for the transmission of messages for the Government and for the general public according to the provisions of the Act of July 24, 1866, and what we have said with respect to that Act will equally apply to this Act; it is simply an extension of the provisions of the Act of 1866 to railroad companies when they accept its provisions according to its terms.

There is, therefore, on principle, no basis whatever for the argument and the conclusions sought to be drawn from these Acts that Congress, by its legislation has occupied the field and that therefore that the states are excluded from enacting legislation (as in the case of the Louisiana statute under which this proceeding was instituted) having application to railroads engaged in interstate commerce.

Tnis question was presented to the United States District Court at Louisville, Kentucky, and the conclusion contended for by the telegraph company in the case at bar was sustained by that court.

On appeal the Circuit Court of Appeals for the Sixth Circuit, in affirming the decision of the lower court, in 207 Fed., 11, said:

> IS THE KENTUCKY CONDEMNATION STATUTE INVALID AS ATTEMPTING TO REGULATE INTERSTATE COMMERCE?
>
> By virtue of Act June 15, 1866, c. 124, 14 Stat. 66 Rev. Stat. Sec. 5258 (U. S. Comp. St. 1901, p. 3565), and Act June 8, 1872, c. 335, 17 Stat. 308, 309 (Rev. Stat. Sec. 3964 (U. S. Comp. St, 1901, p. 2707), all railroads are made government post roads. By Act July 24, 1866, c. 230, 14 Stat. 221 Rev. Stat. Secs. 5263-5269 (U. S. Comp. St. 1901, pp. 3579, 3580), telegraph companies are authorized to construct, maintain, and operate lines of telegraph on the public domain and over and along post roads of the United States, such lines to be so constructed and maintained as not to interfere with the ordinary travel on such roads; provision being made for the transmitting of telegrams both for the public

and for the government by railroads having telegraph lines. The transmitting of telegraphic communication is commerce, and telegraph companies doing interstate business are federal instrumentalities of commerce and subject to the jurisdiction of Congress under the commerce clause of the Constitution. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 8, 24 L. Ed. 708, and following. By the act creating the Commerce Court, Act June 18, 1910, c. 309, 36 Stat. 544 (U. S. Comp. St. Supp. 1911, p. 1288), the provisions of the commerce act were extended to telegraph companies.

Appellant contends that by the legislation referred to Congress has occupied the field of regulation with respect to both railroad and telegraph companies engaged in interstate commerce, and by the telegraph act of 1866 referred to has deliberately withheld from telegraph companies the right of eminent domain, and evidenced an intention that telegraph companies may construct and operate telegraph lines on railroad rights of way only with the consent of the railroad companies, thus excluding the states from jurisdiction over that subject. If Congress had so occupied the field and evidenced such intention, the claimed result follows. Northern Pacific Ry. Co. v. State of Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; Second Employers' Libility Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Fd. 314. But the mere fact that Congress has legislated upon the general subject does not exclude state legislation, unless an intent exclusively to occupy the field is indicated, except where the state legislation conflicts with the federal. See Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Fd. 1511, recently decided by the Supreme Court. The case specially relied upon to support the contention that Congress has denied to telegraph companies eminent domain on railroad rights of way is Western Union Telegraph Co. v. Pennsylvania R. R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Fd. 312, 1 Ann. Cas. 517, cited in an earlier part of this opinion. That case, in our opinion, lends no support to this contention. True, it was there held that the act of 1866 did not confer upon telegraph companies the right of eminent domain, or authorize the occupation by telegraph companies of the rights of way of railway companies without the consent of the latter; and, as there was in that case no state statute which was even claimed to

give such right, the effect of such statute had there been one, was expressly passed by without determination. There is, however, in our judgment, nothing in the opinion cited which even impliedly casts doubt upon the validity of such state legislation. On the contrary, certain decisions of the inferior federal courts sustaining the right of eminent domain under state statutes are there cited without disapproval.

In the Pennsylvania case Congress was not declared to have occupied the field of regulation in the respect stated, nor to have indicated an intention to exclude the exercise of eminent domain under state legislation. On the contrary, "the fundamental idea and sole purpose" of the act of 1866 was held to be "a prohibition of all state monopolies," citing and relying upon Pensacola Telegraph Co. vs. Western Union Telegraph Co., *supra*. As expressed in Western Union Telegraph Co. vs. Richmond, 224 U. S., 160, 169, 32 Sup. Ct., 449, 451 (56 L. Ed., 710):

"It (the act of 1866) made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a state to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own."

Not only do we see nothing in the Act of 1866 indicating an intention by Congress to exclude the power of the states to grant telegraph companies the right of eminent domain with respect to railroad rights of way, but we think such statutes directly promote the object of the federal statute as declared in the Pennsylvania and Richmond cases, and that it was the intention of Congress to leave to the states the question of granting or withholding the right of eminent domain.

IV.

The question of the right of the Telegraph Company to expropriate any part of the Railroad Company's bridges across navigable streams or waters in Louisiana considered.

In the brief filed by plaintiff in error the contention is made that the telegraph company has no such right, and the Act of Congress of March 23, 1906, entitled An Act to Regulate

the Construction of Bridges over Navigable Waters (37 Stat., 84) is relied upon as a foundation for the argument.

The first section of this Act requires, as a condition precedent to the construction and maintenance of a bridge across the navigable waters of the United States, that its plans and a map of the proposed location shall have been submitted to the Secretary of War for approval, and until approved the right to construct and maintain such bridge is not granted.

By the second section of the Act such bridge is held to be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission of the mails, troops and munitions of war of the United States than for the transportation over any railroad, street railway or public highway leading to said bridge.

The concluding part of section 2 reads as follows:

> "and the United States shall have the right to construct, maintain and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies."

The latter part of section 2 thus recognizes the right of all telegraph and telephone companies to an equality of privileges upon the bridge and its approaches. The proper interpretation of this provision would seem to be that a telegraph company having or securing the right to construct and maintain its line along the right of way should equally secure rights in and along the bridge and its approaches over said navigable waters as a constituent part of the railroad line, and no reason can be given why such bridges over navigable waters constructed in accordance with the Acts of Congress (as presumably the railroad bridges in this case are) should not be treated as a constituent or component part of the railroad company's line.

The Act of Louisiana evidently contemplates this for it provides that a telegraph company may construct and maintain such telegraph lines "* * * along and parallel to any of the railroads in the State; provided, that the ordinary use of such roads, works, railroads and waters be not

thereby obstructed," and further we have the provision that the lines shall be so constructed as "not to impede or obstruct the full use of the highways, navigable waters, or the drainage or natural servitudes of the land over which the right of way may be exercised."

This Act has, we submit, been properly construed by the District Court as bringing the structures over the navigable waters within the same rule under the State statute as the right of way obtained, and nothing in the Act of Congress of March 23, 1906, militates against this construction; on the contrary that Act would seem to indicate the intention of Congress that the telegraph company should have the same privileges with respect to the bridges and approaches as with respect to any other portions of the right of way, and if one is subject to the exercise of the right of eminent domain, there is no reason to suppose that either Congress or the Legislature of Louisiana intended to withhold the other therefrom.

It is submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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APPENDIX.

An Act to Provide for the Incorporation and Regulation of Telegraph Companies, Passed April 12, 1848.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. Any number of persons may associate for the purpose of constructing a line of wires of telegraph through this State, or from and to any point within this State, upon such terms and conditions, and subject to the liabilities prescribed in this act.

"SEC. 2. Such persons, under their hands and seal, shall make a certificate which shall specify:

"1st. The name assumed to distinguish such association, and to be used in its dealings, and by which it may sue and be sued.

"2nd. The general route of the line of telegraph, designating the points to be connected.

"3rd. The capital stock of such association, and the number of shares into which the stock shall be divided.

"4th. The names and places of residence of the shareholders, and the number of shares held by each of them, respectively.

"5th. The period at which such association shall commence and terminate, which certificate shall be proved or acknowledged, and recorded in the office of the clerk of the county, where any office of such association shall be established, and a copy thereof filed in the office of the secretary of state. Such acknowledgment may be taken by any officer authorized to take the acknowledgment of deeds of real estate, at the place where such acknowledgment is taken.

"SEC. 3. Upon complying with the provisions of the last preceding section, such association shall be, and hereby is declared to be, a body corporate, by the name so as aforesaid to be designated in said certificate; and a copy of said certificate, duly certified by the clerk of the county where the same is filed and recorded or by the secretary of state, may be used

as evidence in all courts and places, for and against any such association.

"SEC. 4. Such association shall have power to purchase, receive and hold, and convey such real estate, and such only as may be necessary for the convenient transaction of the business, and for effectually carrying on the operations of such association, and may appoint such directors, officers and agents, and make such prudential rules, regulations and by-laws, as may be necessary in the transaction of their business, not inconsistent with the laws of this State or of the United States.

"SEC. 5. Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of State, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the cords or wires of such lines, provided the same shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said water; nor shall this act be so construed as to authorize the construction of any bridge across any of the waters of this State.

"SEC. 6. If any person over whose lands said lines shall pass, upon which said posts, piers or abutments shall be placed, shall consider himself aggrieved or damaged thereby, it shall be the duty of the County Court of the county within which said lands are, on the application of such person, and on notice to said association (to be served on the president or any director) to appoint five discreet and disinterested persons as commissioners, who shall severally take an oath before any person authorized to administer oaths, faithfully and impartially to perform the duties required of them by this act. And it shall be the duty of said commissioners, or a majority of them, to make a just and equitable appraisal of all the loss or damage sustained by said applicant, by reason of said lines, posts, piers or abutments; duplicates of which said appraisement shall be reduced to writing, and signed by said commissioners, or a majority of them; one copy shall be delivered to the applicant, and the other to the president, or any director or officer of said association or corporation, on demand; and in case any damage shall be adjudged to said applicant, the association or corporation shall pay the amount thereof, with

costs of said appraisal, said costs to be liquidated and ascertained in said award, and said commissioners shall receive for their services two dollars for each day they are actually employed in making said appraisement.

" SEC. 7. Any person who shall unlawfully and intentionally injure, molest or destroy any of said lines, posts, piers or abutments, or the materials or property belonging thereto, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year, or both, at the discretion of the Court before which the conviction shall be had.

" SEC. 8. It shall be lawful for any association of persons organized under this act, by their articles of associations, to provide for an increase of their capital, and of the number of the association.

" SEC. 9. Any association or company now organized and using Morse's telegraph may organize as a corporation under this act on filing in the office of the secretary of state a resolution of its Board of Directors, signed and certified by the officers of the company, of its desire so to organize, and upon publishing notices to this effect in some one newspaper in the City of New York and the City of Buffalo, and the City of Albany, three months previous to such organization, provided that two-fifths of the owner of the stock of said company or association do not dissent therefrom ; provided, that any stock or shareholder in any such association or company may, on giving thirty days' notice to the officers, or any of them, of such association or company, at any time before such organization, refuse to go into such organization, and thereupon such stock or shareholder shall be entitled to receive from such association or company, the full value of his shares or stock in such association or company.

" SEC. 10. The stockholders of every association organized in pursuance of this act shall be jointly and severally personally liable for the payment of all debts and demands against such association, which shall be contracted or which shall be or shall become due during the time of their holding such stock ; but such liability of any stockholder shall not exceed twenty-five per cent. in amount, the amount of stock held by him, and no stockholder shall be

proceeded against for the collection of any debt or demand against such association, until judgment thereon shall have been obtained against the association, and an execution on such judgment shall have been returned unsatisfied in whole or in part, or unless such association shall be dissolved.

" SEC. 11. It shall be the duty of the owner or the association owning any telegraph line, doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch.

" SEC. 12. It shall likewise be the duty of every such owner or association to transmit all dispatches in the order in which they are received, under the like penalty of one hundred dollars, to be recovered with costs of suit, by the person or persons whose dispatch is postponed outside of its order, as herein prescribed; provided, however, that arrangements may be made with the proprietors or publishers of newspapers, for the transmission for the purpose of publication of intelligence of general and public interest, out of its regular order.

" SEC. 13. This act shall take effect immediately."

An Act to Amend an Act, entitled " An Act to Provide for the Incorporation and Regulation of Telegraph Companies," Passed April Twelfth, One Thousand Eight Hundred and Forty-eight. Passed April 8, 1851.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

" SEC. 1. The directors or trustees of any telegraph company formed or incorporated under the act entitled, 'An Act to provide for the Incorporation and Regulation of Telegraph Companies,' passed April twelfth, one thousand, eight hundred and forty-eight, may, at any time, with the written consent of the persons owning two-thirds of the capital stock of

such company extend their line of telegraph, or may construct branch lines to connect with their main lines, or may unite with any other incorporated telegraph company.

"SEC. 2. This act shall take effect immediately."

An Act to Amend an Act, entitled, "An Act to Provide for the Incorporation and Regulation of Telegraph Companies," Passed April Twelfth, One Thousand Eight Hundred and Forty-eight. Passed June 29, 1853.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SEC. 1. Any number of persons may associate, for the purpose of owning or constructing, and maintaining, a line or lines of electric telegraph, whether wholly within or partly beyond the limits of this State; or for the purpose of owning any interest in any such line or lines of electric telegraph, or any grants therefor, upon such terms and conditions, and subject to the liabilities prescribed in the act passed April twelfth, one thousand eight hundred and forty-eight, entitled, 'An Act to provide for the Incorporation and Regulation of Telegraph Companies.' And such association shall, upon complying with the provisions of said act, become a body corporate, and shall have the powers, and be subject to the provisions in the said act, and in the several acts amending the same, contained, not inconsistent herewith. And any telegraph company now owning or using any telegraph line, either wholly or partly within this State, may become a body corporate, and entitled to the benefit of the provisions herein contained, on filing in the office of the secretary of state a certificate of a resolution adopted by a majority of its Board of Directors to organize under this act; which said certificate shall contain the specifications required by the said recited act, and shall be proved or acknowledged, and recorded in the manner therein prescribed.

"SEC. 2. Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of telegraph, upon, over or under any of the public roads, streets and highways; and through, across, or under any of

the waters within the limits of this State, subject to the restrictions in the said recited act contained; and also to erect and construct such fixtures upon, through or over any other land, subject to the right of the owner or owners thereof to full compensation for the same; and if any such association cannot agree with the owner or owners of any land taken or used by such association for the compensation to be paid therefor, it shall or may be lawful for such association, or such owner or owners to apply to the County Court of the county in which such lands are, by petition, stating the facts in relation thereto; and after the expiration of twenty-one days from the filing of such petition, and notice thereof given to such association, or to the owner or owners of such land, as the case may be, it shall be the duty of the said Court to appoint five disinterested persons to make a just and equitable assessment and appraisal, in the manner directed by the said recited act of the loss or damage, if any, which may have been, or is likely to be, sustained by the owner or owners of such land, taken or used as aforesaid, whilst such land shall have been, or shall continue to be used as aforesaid. And such assessment and appraisal shall determine the rent or compensation to be paid by such association for such use, or in lieu thereof, a sum in gross as the compensation for allowing the fixtures belonging to such association permanently to continue, and the same to be repaired, improved and renewed, or removed from time to time, as such association may require.

"SEC. 3. Every such company, owning or using a line of electric telegraph, partly within and partly beyond the limits of this State, shall render to the proper officer a true report of the cost to such company of their works within this State; and the stock of such company in amount equal to such cost, or the dividends thereof, shall be subject to taxation in the same manner, and at the same rate, as the stocks or dividends of other companies incorporated by the laws of this State are subject.

"SEC. 4. The liability of any share or stockholder in any company organized under this act, as provided for in the act of which this is an amendment, shall only apply to the amount due by any such share or stockholder in such company, and unpaid, on or for any such share of stock."

"An Act to Amend an Act, Passed April Twelfth, Eighteen Hundred and Forty-eight, to Provide for the Incorporation and Regulation of Telegraph Companies. Passed April 19, 1855.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. The eleventh section of the act passed April twelve, eighteen hundred and forty-eight, to provide for the incorporation and regulation of telegraph companies, is amended so as to read as follows:

"SEC. 11. It shall be the duty of the owner, or the association owning any telegraph line, doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch; provided that nothing contained in this section shall be construed to require any telegraph company or association to receive and transmit dispatches from or for any other company or association, owning a line of telegraph parallel with or doing business in competition with the line over which the dispatch is required to be sent.

"SEC. 2. This act shall take effect immediately."

"An Act to Change the Name of the New York and Mississippi Valley Printing Telegraph Company. Passed April 4, 1856.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. The name of 'The New York and Mississippi Valley Printing Telegraph Company,' a body corporate, organized under the general laws of this State, is hereby changed to the 'Western Union Telegraph Company;' and the said company shall have the right to continue to hold and manage the property and affairs of the said telegraph company,

as a corporation, by or under the name and style of 'The Western Union Telegraph Company.' But nothing herein shall be construed to affect any action now pending in favor of or against said company; and in case any action shall be hereafter commenced against the said company, in this State or elsewhere, by any person or party not knowing the change of the corporate name of said company, it shall not be authorized to plead a misnomer, but shall answer or plead to the merits of the action, stating in such answer the true name of said corporation; and such action shall proceed against it in either name, according to the practice of the Court in which such action shall be pending; and any judgment recovered therein shall be as valid as if the action had been commenced and conducted against the said company by its true name.

"SEC. 2. This act shall take effect immediately."

"An Act Further to Amend an Act Entitled 'An Act to Provide for the Incorporation and Regulation of Telegraph Companies,' Passed April Twelfth, Eighteen Hundred and Forty-eight. Passed April 22, 1862; three-fifths being present.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. Any telegraph company which is duly incorporated under and in pursuance of the act entitled, 'An Act to Provide for the Incorporation and Regulation of Telegraph Companies,' passed April twelfth, eighteen hundred and forty-eight, may construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of this State, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon the terms and conditions and subject to the liabilities prescribed in said act, so far as such provisions are applicable to the construction, using, maintaining,

owning or holding of telegraph lines, or any interest therein, pursuant to the provisions of this act.

"SEC. 2. In case any company incorporated as before mentioned shall become the owners or lessees of, or engaged in the construction, use or maintenance of any line or lines of electric telegraph, not described in their original certificate of organization, or shall join with any other corporation or association in leasing, constructing, owning, using or maintaining any such line or lines, or shall own or hold any interest in such line or lines, or shall become lessee of any such line or lines, such company, within one year after constructing or becoming such owners or lessees, or after joining with any other corporation or association in such construction, leasing or ownership, or after acquiring any other interest in such line or lines, shall file in the office of the secretary of state of this State a certificate describing the general route of such line or lines, designating the extreme points connected thereby, as provided in Section Two of the act hereby amended; which certificate shall be executed by at least two-thirds of the directors of such corporation under their hands and seals, and shall be acknowledged by them as prescribed in subdivision five of the second section above mentioned.

"SEC. 3. Any telegraph company incorporated as mentioned in the first section of this act, which before the passing of this act shall have purchased, constructed or leased, or shall have joined with any other corporation or association in the purchase, construction or leasing, or shall have become the owner or holder of any interest in any line or lines of telegraph not described in their original certificate of organization, may, within one year after the passage of this act make and file in the office of the secretary of state such certificate as is provided in the second section of this act, and upon the filing of such certificate, their act, if otherwise within the provisions of this statute, shall be as valid and effectual as if done after the passing of this act, saving all existing rights of other persons.

"SECTION 4. This act shall take effect immediately."